

ARKANSAS CODE OF 1987 ANNOTATED

OFFICIAL EDITION



VOLUME 15 • TITLE 16, CH. 55-89



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ARKANSAS CODE OF 1987 ANNOTATED



VOLUME 15

2005 Replacement

TITLE 16: PRACTICE, PROCEDURE, AND COURTS (CHAPTERS 55-89)

Prepared by the Editorial Staff of the Publisher

Under the Direction and Supervision of the
ARKANSAS CODE REVISION COMMISSION

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4067911

ISBN 0-8205-7191-1



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Sources

This volume contains legislation enacted by the Arkansas General Assembly through the 2005 Regular Session. Annotations are to the following sources:

Arkansas Supreme Court and Arkansas Court of Appeals Opinions through 2005 Ark. LEXIS 504 (September 22, 2005) and 2005 Ark. App. LEXIS 696 (September 28, 2005).

Federal Supplement through September 28, 2005.

Federal Reporter 3d Series through September 28, 2005.

United States Supreme Court Reports, through September 28, 2005.

Bankruptcy Reporter through September 28, 2005.

Arkansas Law Notes through the 2001 Edition.

Arkansas Law Review through Volume 57, p. 441.

University of Arkansas at Little Rock Law Journal through Volume 26, p. 513.

ALR 6th through Volume 4, p. 599.

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| 2. Agriculture | 16. Practice, Procedure, and Courts |
| 3. Alcoholic Beverages | 17. Professions, Occupations, and Businesses |
| 4. Business and Commercial Law | 18. Property |
| 5. Criminal Offenses | 19. Public Finance |
| 6. Education | 20. Public Health and Welfare |
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User's Guide

Differences in language, subsection order, punctuation, and other variations in the statute text from legislative acts, supplement pamphlets, and previous versions of the bound volume, are editorial changes made at the direction of the Arkansas Code Commission pursuant to the authority granted in § 1-2-303.

Many of the Arkansas Code's research aids, as well as its organization and other features, are described in the User's Guide, which appears near the beginning of Volume 1 of the Code.

TITLE 16

PRACTICE, PROCEDURE, AND COURTS

(CHAPTERS 1-17 IN VOLUME 14A; CHAPTERS 18-54 IN
VOLUME 14B; CHAPTERS 90-126 IN VOLUME 16)

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2. OATHS AND AFFIRMATIONS.
3. LEGAL NOTICES AND ADVERTISEMENTS.
4. UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT.
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- 57. FORMS OF ACTION. [REPEALED.]
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- 81. ARREST.
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- 105. ABATEMENT OF NUISANCES.
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- 121. UTILITIES TAMPERING.
- 122. CIVIL LIABILITY OF PERSONS CAUGHT SHOPLIFTING.
- 123. CIVIL RIGHTS.
- 124. DRUG DEALER LIABILITY ACT.
- 125. IMMUNITY FOR YEAR 2000 COMPUTER ERRORS.
- 126. SALE OF ALCOHOL TO MINOR.

SUBTITLE 5. CIVIL PROCEDURE GENERALLY

Publisher's Notes. Section 857 of the Civil Code provided, in part, that the repeal of inconsistent statutes by that section did not revive any statute or law which may have been repealed or abolished by the repealed statutes or laws, nor did it affect any right already existing or any proceeding already taken, except as provided in the code.

Effective Dates. Code of Practice in Civil Cases, § 890: effective on passage for purposes of validity of proceedings but no proceeding before Jan. 1, 1869 rendered invalid; effective Jan. 1, 1869, for all purposes and proceedings.

CASE NOTES

ANALYSIS

Construction.
Purpose.

Construction.

The Civil Code of 1869 was not designed to destroy rights or to alter principles of law, but only to formulate remedies, and should not be construed to repeal laws

giving a remedy under circumstances where no other is provided under the code. *State v. Arkansas Brick & Mfg. Co.*, 98 Ark. 125, 135 S.W. 843 (1911).

Purpose.

The Civil Code was only intended to change the forms of actions and abolish the old forms and modes of procedure. *Whitehead v. Wells*, 29 Ark. 99 (1874).

CHAPTER 55

GENERAL PROVISIONS

SUBCHAPTER.

- 1. GENERAL PROVISIONS.
- 2. CIVIL JUSTICE REFORM ACT OF 2003.

Publisher's Notes. Some provisions of this subchapter may be superseded by the Arkansas Rules of Civil Procedure, the Arkansas Rules of Appellate Procedure, or the Arkansas Rules for Inferior Courts [now District Courts] pursuant to the Supersession Rule adopted by the Supreme Court of Arkansas in its order of December 18, 1978.

Cross References. Motion day and hearings on motions, ARCP 78.

Effective Dates. Code of Practice in Civil Cases, § 890: effective on passage for purposes of validity of proceedings but no proceeding before Jan. 1, 1869, rendered invalid; effective Jan. 1, 1869, for all purposes and proceedings.

Acts 1871, No. 48, § 1 [890]: effective 90 days after passage.

Acts 1915, No. 290, § 24: June 1, 1915.

Acts 1991, No. 470, § 7: Mar. 12, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that provisions of a lawsuit settlement contract which would prohibit any person's disclosure of the existence of an environmental hazard is contrary to public policy; that such provisions are included in may lawsuit settlement contracts; that this Act applies to such contracts entered into after its effective date; and that this Act should therefor go into effect immediately. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

Ark. L. Rev. La Dolce Vita — Law and Equity Merged at Last!, 24 Ark. L. Rev. 162.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 16-55-101. Title of code.
- 16-55-102. [Repealed.]
- 16-55-103. Applicability of code.
- 16-55-104. Construction of code.
- 16-55-105. Amendment or repeal of code.
- 16-55-106, 16-55-107. [Repealed.]
- 16-55-108. Authority of deputies.
- 16-55-109. [Repealed.]
- 16-55-110. Boards — Authority of majority.
- 16-55-111. Classes of remedies.
- 16-55-112. Authority to grant provisional remedy.
- 16-55-113. Writ of ne exeat abolished.
- 16-55-114. Notices — Form — Service generally.
- 16-55-115. Notice — Additional method of service.

SECTION.

- 16-55-116. Notice — Service upon certain persons.
- 16-55-117. Notice — Duty of officer serving.
- 16-55-118. Laws requiring notice or summons for specified time before term amended to permit action taken on any day court is in session.
- 16-55-119. Computation of time.
- 16-55-120. Affirmation in lieu of oath.
- 16-55-121. Successive actions on same contract or transaction.
- 16-55-122. Contract provisions restricting disclosure of environmental hazards are void.

16-55-101. Title of code.

This code shall be known as the "Code of Practice in Civil Cases" in this state.

History. Civil Code, Preliminary Provisions, § 1; A.S.A. 1947, § 27-101.

Publisher's Notes. The code referred

to in this section means the Code of Practice in Civil Cases of 1869. See parallel reference tables in the tables volume.

16-55-102. [Repealed.]

Publisher's Notes. This section, concerning definitions, was repealed by Acts 2003, No. 1185, § 186. The section was derived from Civil Code, Preliminary Provisions, §§ 3, 4; Civil Code, §§ 704, 705, 837-855; C. & M. Dig., §§ 1028, 1029,

1325, 1326, 9732-9750; Pope's Dig., §§ 1230, 1231, 1550, 1551, 13258-13276; A.S.A. 1947, §§ 27-106, 27-107, 27-109 — 27-115, 27-117 — 27-125, 27-127 — 27-129, 27-1201, 27-1202.

16-55-103. Applicability of code.

(a) Except as otherwise provided by law, this code shall regulate the procedure in all civil actions and proceedings in the courts of this state.

(b) Except as otherwise provided by law, the provisions of this code shall apply to and regulate the proceedings of all the courts of this state, though not expressly enumerated, and of all that may hereafter be created.

History. Civil Code, §§ 780, 796; C. & M. Dig., § 1026; Pope's Dig., § 1228; A.S.A. 1947, §§ 27-102, 27-103.

Publisher's Notes. The code referred

to in this section means the Code of Practice in Civil Cases of 1869. See parallel reference tables in the tables volume.

RESEARCH REFERENCES

Ark. L. Rev. Civil Procedure — Application of Class Suits to Unincorporated

Associations in Law Actions in Arkansas, 23 Ark. L. Rev. 474.

CASE NOTES

ANALYSIS

Contest of wills.

Garnishment.

Contest of Wills.

The Civil Code repealed earlier laws relating to the contest or rejection of wills. *Dowell v. Tucker*, 46 Ark. 438 (1885).

Garnishment.

The Civil Code repealed former law re-

lating to default against garnishee. *Saint Louis, I.M. & S. Ry. v. Richter*, 48 Ark. 349, 3 S.W. 56 (1886).

Cited: *Haller v. Ratcliffe*, 215 Ark. 628, 221 S.W.2d 886 (1949); *Thomas v. Dean*, 245 Ark. 446, 432 S.W.2d 771 (1968); *Sharum v. Dodson*, 264 Ark. 57, 568 S.W.2d 503 (1978).

16-55-104. Construction of code.

(a) The rule of common law that statutes in derogation of the common law are to be strictly construed shall not be applied to the code.

(b) The provisions of the code, and all proceedings under it, shall be liberally construed, with a view to promote its object and to assist the parties in obtaining justice.

History. Civil Code, § 856; C. & M. Dig., § 9751; Pope's Dig., § 13277; A.S.A. 1947, § 27-131.

Publisher's Notes. The code referred

to in this section means the Code of Practice in Civil Cases of 1869. See parallel reference tables in the tables volume.

CASE NOTES

ANALYSIS

Pleadings.
Process.

Pleadings.

To deny parties their day in court merely because the captions of their petition and claim recited the name of wrong county, the petition being timely filed and no one being misled or deceived, would be an injustice and not in keeping with Arkansas' liberalized form of pleadings. Ed-

wards v. Brimm, 236 Ark. 588, 367 S.W.2d 433 (1963).

Process.

The statute directing the circuit courts to issue process upon an indictment being found should be liberally construed with a view to promote its object. State ex rel. Nixon v. Grace, 98 Ark. 505, 136 S.W. 670 (1911).

Cited: Woods v. Woods, 285 Ark. 175, 686 S.W.2d 387 (1985).

16-55-105. Amendment or repeal of code.

No act shall have the effect to amend or repeal or be construed as amending or repealing any title, chapter, article, section, clause, or provision of this code unless the intention is expressly stated, and the title, chapter, article, or section shall be particularly referred to and recited in the act amending or repealing it.

History. Civil Code, § 858; C. & M. Dig., § 9753; Pope's Dig., § 13279; A.S.A. 1947, § 27-134.

Publisher's Notes. The code referred

to in this section means the Code of Practice in Civil Cases of 1869. See parallel reference tables in the tables volume.

RESEARCH REFERENCES

Ark. L. Rev. Legislative and Judicial Dynamism in Arkansas: Poisson v. d'Avril, 22 Ark. L. Rev. 724.

16-55-106, 16-55-107. [Repealed.]

Publisher's Notes. These sections, concerning courts having jurisdiction similar to circuit, probate, or justice of the peace courts and clerks' duties devolve on magistrates, were repealed by Acts 2003, No. 1185, § 187. The sections were derived from the following sources:

16-55-106. Civil Code, § 797; A.S.A. 1947, § 27-104.

16-55-107. Civil Code, § 808; A.S.A. 1947, § 27-116.

16-55-108. Authority of deputies.

Any duty enjoined by this code upon a ministerial officer and any act permitted to be done by him or her may be performed by his or her lawful deputy.

History. Civil Code, § 781, C. & M. Dig., § 9754; Pope's Dig., § 13280; A.S.A. 1947, § 27-132.

Publisher's Notes. The code referred

to in this section means the Code of Practice in Civil Cases of 1869. See parallel reference tables in the tables volume.

CASE NOTES

Summons.

Summons was not defective where it did not contain the signature of the county circuit clerk, but was signed by the deputy

clerk. *Nucor Corp. v. Kilman*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 390 (June 17, 2004).

16-55-109. [Repealed.]

Publisher's Notes. This section, concerning masters, was repealed by Acts 2003, No. 1185, § 188. The section was derived from Rev. Stat., ch. 23, §§ 72, 74,

77; C. & M. Dig., §§ 7151, 7152, 7155; Pope's Dig., §§ 9137, 9138, 9141; Acts 1981, No. 900, § 1; A.S.A. 1947, §§ 27-1801, 27-1802, 27-1805.

16-55-110. Boards — Authority of majority.

An authority conferred upon three (3) or more persons may be exercised by a majority of them and a majority of three (3) or more persons may do any act directed to be performed by them.

History. Civil Code, § 782; C. & M. Dig., § 9755; Pope's Dig., § 12511; A.S.A. 1947, § 27-133.

CASE NOTES

ANALYSIS

Applicability.

Board of assessors.

Applicability.

This section applies only to boards whose appointment is provided by statute, and not to boards appointed by the court under agreement of the parties. *Weaver v. McLean*, 141 Ark. 406, 217 S.W. 10 (1919).

Board of Assessors.

Even if this section would be applicable to a board of assessors for an improvement district, the action of two members of the board, in the absence of the third, without notice to him or opportunity on his part to be present or participate, was unauthorized. *Kirst v. Street Imp. Dist.* No. 120, 86 Ark. 1, 109 S.W. 526 (1908).

Cited: *Ellison v. Oliver*, 147 Ark. 252, 227 S.W. 586 (1921).

16-55-111. Classes of remedies.

Remedies in civil cases are divided into two (2) classes:

- (1) Actions;
- (2) Special proceedings.

History. Civil Code, Preliminary Provisions, § 2; C. & M. Dig., § 1027; Pope's Dig., § 1229; A.S.A. 1947, § 27-105.

CASE NOTES

Cited: *Coleman v. Coleman*, 257 Ark. 404, 520 S.W.2d 239 (1975); *Orlando v. Wizel*, 443 F. Supp. 744 (W.D. Ark. 1978).

16-55-112. Authority to grant provisional remedy.

A provisional remedy as provided in this code may be granted only by the judge of the court in which the action is brought, or by any circuit judge.

History. Civil Code, § 791; Acts 1871, No. 48, § 1 [791], p. 219; 1873, No. 88 [791], p. 213; C. & M. Dig., § 5793; Pope's Dig., § 7509; A.S.A. 1947, § 27-108.

Publisher's Notes. The code referred to in this section means the Code of Practice in Civil Cases of 1869. See parallel reference tables in the tables volume.

CASE NOTES**Habeas Corpus.**

Where mother of child consented by verified pleading to appointment of welfare director as guardian for child, and later on the same day attempted to revoke

authority, mother was not entitled to writ of habeas corpus, but must file a complaint in probate court to set aside prior order. *Haller v. Ratcliffe*, 215 Ark. 628, 221 S.W.2d 886 (1949).

16-55-113. Writ of ne exeat abolished.

The writ of ne exeat as a remedy in a civil action is abolished.

History. Civil Code, § 790; C. & M. Dig., § 1040; Pope's Dig., § 1242; A.S.A. 1947, § 27-202.

CASE NOTES

Cited: *Ex parte Caple*, 81 Ark. 504, 99 S.W. 830 (1907).

16-55-114. Notices — Form — Service generally.

(a)(1) The notices mentioned in this code shall be in writing, and may be served by a sheriff, constable, coroner, or marshal of a town or city, whose return thereon shall be proof of the service.

(2) Notices may also be served by any person not a party or interested in the action or proceeding, whose affidavit shall be proof of the service, or by acknowledgment thereon in writing by the party upon whom served.

(b) The service of a notice shall be by giving a copy to the person to whom it is directed, or, if he or she cannot be found at his or her usual place of abode, by leaving a copy there with a person over the age of sixteen (16) years residing in the same family with him, or, if no such person is there, then by affixing a copy to the front door of the place of abode. If the person to whom the notice is directed cannot be found, and

has no known place of abode in this state, the notice may be served by delivering a copy to his or her attorney.

(c) The return of the officer, or the affidavit of the person who served the notice, shall state the time and manner of the service. Where a copy of the notice is not given to the person to whom it is directed, the return or affidavit shall state the facts authorizing the manner of service pursued.

History. Civil Code, §§ 706, 707; C. & M. Dig., §§ 1327, 1328; Pope's Dig., §§ 1552, 1553; A.S.A. 1947, §§ 27-1203, 27-1204.

Publisher's Notes. The code referred to in this section means the Code of Practice in Civil Cases of 1869. See parallel reference tables in the tables volume.

CASE NOTES

Notice to Railroad Companies.

This section is confined to notices mentioned in the Civil Code and has no application to service of notice to railroad companies to construct and maintain stock

guards, as such notice must be served as required by § 23-12-304. *Kansas City, P. & G. Ry. v. Lowther*, 68 Ark. 238, 57 S.W. 518 (1900); *Kansas City, P. & G. Ry. v. Pirtle*, 68 Ark. 548, 60 S.W. 657 (1901).

16-55-115. Notice — Additional method of service.

(a) Wherever, in connection with the taking of depositions, the filing of motions, or in any other matters either during the pendency of a suit or prior to a litigation, the law requires the service of notice by one (1) person upon another, except in the case of service of a summons, that notice may be served by registered or certified mail, addressed to the person to be served at his or her last known address, or to his or her attorney, if he or she has an attorney employed in connection with the matter in which the notice is to be served, with return receipt requested. The return receipt of the person or his or her attorney or the affidavit of the person making the service shall be evidence of service of the notice.

(b)(1) This section shall be cumulative of present methods provided by law for service of notice.

(2) Service shall be sufficient by:

(A) The method provided for in this section;

(B) Any method authorized by law prior to June 13, 1957; or

(C) Waiver in writing of service.

History. Acts 1957, No. 288, § 3; A.S.A. 1947, § 27-1212.

16-55-116. Notice — Service upon certain persons.

(a)(1) Where it is not otherwise specially provided, notice to a party in an action of any motion or proceeding to be made or taken in the action in court or before a judge may be served upon the party or his or her attorney.

(2) The service upon the attorney in any such case shall be by delivering to him or her a copy of the notice.

(b) A notice to a person constructively summoned and not appearing shall be served on the attorney appointed to defend for him or her.

(c) A notice to an infant or person of unsound mind shall be served on the guardian or next friend bringing or defending the action for him or her.

(d) A notice to a corporation may be served in the same manner as a summons in an action against it.

(e) Where the party has no known place of abode in this state and no attorney in the county where the action is pending, or where the parties, plaintiffs, or defendants are numerous, the court may direct the mode of serving notices and to which persons they shall be given.

History. Civil Code, §§ 708-710, 712, 1559; A.S.A. 1947, §§ 27-1205 — 27-1207, 713; C. & M. Dig., §§ 1329-1331, 1333, 27-1209, 27-1210.
1334; Pope's Dig., §§ 1554-1556, 1558,

CASE NOTES

ANALYSIS

Applicability.

Garnishment.

Motion to vacate judgment.

Applicability.

Subsection (d) is not confined to notices mentioned in the Civil Code; so a notice to a railroad company to construct a stock guard may be served upon any station agent of the railroad company in the county. *Saint Louis & S.F.R.R. v. Hale*, 82 Ark. 175, 100 S.W. 1148 (1907).

Subsection (a) is applicable only to the notice to be given of a motion or proceeding to be made or taken before a judge or court and does not apply to a notice given

by a surety to the obligee. *Stocker v. Southwestern Co.*, 245 Ark. 350, 432 S.W.2d 481 (1968).

Garnishment.

A garnishee not served personally with a writ of garnishment has no notice of the suit by reason of service of the writ on an attorney not employed by the garnishee generally nor in the particular litigation. *Woods v. Quarles*, 178 Ark. 1158, 13 S.W.2d 617 (1929).

Motion to Vacate Judgment.

A notice of a motion to vacate a void judgment may be served on the attorney of the opposite party. *State v. West*, 160 Ark. 413, 254 S.W. 828 (1923).

16-55-117. Notice — Duty of officer serving.

(a) It shall be the duty of the sheriff and of every constable to whom any notice in an action may be delivered for service within his or her county to serve and return the notice to the party who delivered it to him or her.

(b) A failure to perform this duty may be punished as a disobedience of the process of the court.

History. Civil Code, § 715; C. & M. Dig., § 1336; Pope's Dig., § 1561; A.S.A. 1947, § 27-1211.

16-55-118. Laws requiring notice or summons for specified time before term amended to permit action taken on any day court is in session.

Whether specifically mentioned in this act or not, any law or part of a law requiring notice or summons to be served or published a specific length of time before the beginning of a term before the steps authorized in the law may be had at such terms in any civil or special proceeding is hereby amended to permit such steps to be taken on any day that the court meets in regular or adjourned session after the expiration of the time required in the law for service.

History. Acts 1915, No. 290, § 23; C. & M. Dig., § 1210; Pope's Dig., § 1433; A.S.A. 1947, § 27-135. 290, codified as §§ 16-44-107, 16-55-118, 16-58-119, 16-58-126, 16-58-130, 16-63-202, 16-63-217, 16-63-218, 16-64-106, 16-64-107, 16-64-127, 16-110-103.

Meaning of "this act". Acts 1915, No.

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law, Civil Procedure, 1 UALR L.J. 131.

16-55-119. Computation of time.

Where a certain number of days are required to intervene between two (2) acts, the day of one (1) only of the acts may be counted.

History. Civil Code, § 784; C. & M. Dig., § 9756; Pope's Dig., § 13281; A.S.A. 1947, § 27-130.

CASE NOTES

ANALYSIS

In general.
Applicability.
Election laws.
First day.
Limitation of actions.
Unlawful detainer.

In General.

When a certain number of days are required to intervene between two acts, the day of one, only, of the acts is to be counted, but when a statute requires notice of at least a certain number of days before an act, this means so many full days, and the day of the notice and the act are both excluded from the computation. *Jones v. State*, 42 Ark. 93 (1883); *Moore v. State*, 52 Ark. 265, 12 S.W. 562 (1889).

July 1 notice to tenant whose tenancy expired December 31 was insufficient to constitute six months' notice. *Gregory v.*

Walker, 239 Ark. 415, 389 S.W.2d 892 (1965).

Applicability.

This section does not apply to computation of time in rule of political party. *Williamson v. Montgomery*, 185 Ark. 1129, 51 S.W.2d 987 (1932).

Election Laws.

Where statute required certificate of nomination to be filed with election commissioners "not less than fifteen days before the election," one day should be excluded in the computation. *State v. Hunter*, 134 Ark. 443, 204 S.W. 308 (1918).

First Day.

The general rule in calculating a limitations period is to exclude the first day from the computation. *Hodge v. Wal-Mart Stores, Inc.*, 297 Ark. 1, 759 S.W.2d 203 (1988).

The day on which a nonsuit is taken

should be excluded from computation. *Hodge v. Wal-Mart Stores, Inc.*, 297 Ark. 1, 759 S.W.2d 203 (1988).

Limitation of Actions.

In computing time to ascertain whether action is barred by limitations, day on which right of action accrued must be excluded, and day of issuing summons included. *Peay v. Pulaski County*, 103 Ark. 601, 148 S.W. 491 (1912). But see *Shinn v. Tucker*, 33 Ark. 421 (1878).

The Supreme Court has followed the method of calculation in this section and in ARCP 6(a) in fixing a limitation period for the time for filing pleadings as well as for certain notices. *Grubbs v. Credit Gen.*

Ins. Co., 327 Ark. 479, 939 S.W.2d 290 (1997).

Unlawful Detainer.

In determining the time for bringing action for unlawful detainer under § 18-60-303 requiring three days' notice to quit, the day of serving notice may be counted. *Whitner v. Thompson*, 188 Ark. 240, 65 S.W.2d 28 (1933).

Cited: *Widmer v. J.I. Case Credit Corp.*, 239 Ark. 12, 386 S.W.2d 702 (1965); *Globe Life Ins. Co. v. Humphries*, 258 Ark. 118, 522 S.W.2d 669 (1975); *Synergy Gas Corp. v. H.M. Orsburn & Son*, 15 Ark. App. 128, 689 S.W.2d 594 (1985).

16-55-120. Affirmation in lieu of oath.

Whenever an oath is required by this code, the affirmation of a person conscientiously scrupulous of taking an oath shall have the same effect.

History. Civil Code, § 783; A.S.A. 1947, § 27-126.

Publisher's Notes. The code referred to in this section means the Code of Prac-

tice in Civil Cases of 1869. See parallel reference tables in the tables volume.

Cross References. Affirmation in lieu of oath, § 16-2-101.

16-55-121. Successive actions on same contract or transaction.

Successive actions may be maintained upon the same contract or transaction whenever, after the former action, a new cause of action has arisen therefrom.

History. Civil Code, § 789; C. & M. Dig., § 1083; Pope's Dig., § 1291; A.S.A. 1947, § 27-136.

CASE NOTES

ANALYSIS

Issues raised.
Res judicata.

Issues Raised.

When there is any uncertainty as to whether the precise question was raised and determined in the former suit and the record leaves the matter in doubt, extrinsic evidence showing the precise point involved and determined is admissible to remove the uncertainty. *JeToCo Corp. v. Hailey Sales Co.*, 268 Ark. 340, 596 S.W.2d 703 (1980).

Plaintiff could maintain a suit to seek recovery of rentals accruing after previous trial, even though the parties were the

same and the issues were basically the same as those involved in the earlier suit. *JeToCo Corp. v. Hailey Sales Co.*, 268 Ark. 340, 596 S.W.2d 703 (1980).

Res Judicata.

Where it was determined upon a former trial that a contract between certain parties was rescinded, the determination of this question is binding on the parties and their privies and prevents a second adjudication of the same question in another suit; and this rule is unchanged by this section. *National Sur. Co. v. Coates*, 83 Ark. 545, 104 S.W. 219 (1907).

Res judicata held to bar later action. *Hemingway v. Grayling Lumber Co.*, 125 Ark. 400, 188 S.W. 1186 (1916).

The true test of whether a particular point, question, or right has been concluded by a former suit and judgment is whether the point, question, or right was distinctly put in issue, or should have been put in issue, and was directly determined by the former suit and judgment. *JeToCo Corp. v. Hailey Sales Co.*, 268 Ark. 340, 596 S.W.2d 703 (1980).

Where there is a dispute between the parties as to what was decided in the former case, the holding of the Supreme Court on appeal in that former case as to what had been determined in the trial court is conclusive. *JeToCo Corp. v. Hailey Sales Co.*, 268 Ark. 340, 596 S.W.2d 703 (1980).

16-55-122. Contract provisions restricting disclosure of environmental hazards are void.

(a) Any provision of a contract or agreement entered into to settle a lawsuit which purports to restrict any person's right to disclose the existence or harmfulness of an environmental hazard is declared to be against the public policy of the State of Arkansas and therefore void.

(b) For purposes of this section, the term "environmental hazard" means a substance or condition that may affect land, air, or water in a way that may cause harm to the property or person of someone other than the contracting parties to a lawsuit settlement contract referred to in subsection (a) of this section.

(c) This section applies to settlement contracts or agreements entered into after March 12, 1991.

History. Acts 1991, No. 470, §§ 1-3.

SUBCHAPTER 2 — CIVIL JUSTICE REFORM ACT OF 2003

SECTION.

- 16-55-201. Modification of joint and several liability.
- 16-55-202. Assessment of percentages of fault.
- 16-55-203. Increase in percentage of several share.
- 16-55-204. Applicability of § 16-55-203.
- 16-55-205. Acting in concert.
- 16-55-206. Standards for award of punitive damages.
- 16-55-207. Burden of proof for award of punitive damages.
- 16-55-208. Limitations on the amount of punitive damages.

SECTION.

- 16-55-209. No right to punitive damages.
- 16-55-210. No limitation on certain judicial duties.
- 16-55-211. Bifurcated proceeding.
- 16-55-212. Compensatory damages.
- 16-55-213. Venue.
- 16-55-214. Maximum appeal bond in civil litigation.
- 16-55-215. Burden of proof.
- 16-55-216. Comparative fault.
- 16-55-217. Cause of action not created.
- 16-55-218. Attorney General.
- 16-55-219. Coroner or medical examiner.
- 16-55-220. Applicability and severability.

Preambles. Acts 2005, No. 1380, contained a preamble which read:

"WHEREAS, over the past three years, Arkansas has received two-hundred-forty million dollars (\$240,000,000) from the tobacco Master Settlement Agreement (MSA); and

"WHEREAS, the State of Arkansas will receive a total of one billion six hundred twenty million dollars (\$1,620,000,000) from the MSA over twenty-five (25) years; and

"WHEREAS, the MSA funds are used to fund important state programs, such as

tobacco-use prevention, Medicaid expansion, prescription drug benefits, and hospital and medical services; and

"WHEREAS, the continued receipt of MSA funds is vital to the state's ability to finance these programs; and

"WHEREAS, the state has an important interest in ensuring that tobacco companies that have signed the MSA can appeal massive judgments against them by posting a bond under state law, rather than being forced into bankruptcy, which would disrupt their ability to make payments under the MSA; and

"WHEREAS, a limit on the bond required to stay the execution of a judgment pending appeal would guarantee that no tobacco company is forced into bankruptcy in order to appeal a judgment against it, thus preserving the state's continued receipt of MSA funds,

"NOW THEREFORE, ..."

Effective Dates. Acts 2003, No. 649, § 26: Mar. 25, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that in this state, existing conditions, such as the application of joint and several liability regardless of the percentage of fault, are adversely impacting the availability and affordability of medical liability insurance; that those existing conditions recently have caused several medical liability carriers to stop offering coverage in the state and have caused some medical care providers to curtail or end their practices; that the decreasing availability and affordability of medical liability insurance is adversely affecting the accessibility and affordability of medical care and health insurance coverage in this state; that long term care facilities are having great difficulty hiring qualified

medical directors because physicians could be held liable for an entire judgment even if they are found to be minimally at fault; and that there is a need to improve access to the courts for deserving claimants; and that this act is immediately necessary in order to remedy these conditions and improve access to health care in this state. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2003, No. 1471, § 2: Apr. 16, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that Act 649 of 2003 is now in effect; that its cap on punitive damage awards is unclear as to whether it applies to each plaintiff or to the judgment; that this act clarifies that the cap applies to each plaintiff and not the judgment; and that until this act goes into effect, confusion may exist. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

16-55-201. Modification of joint and several liability.

(a) In any action for personal injury, medical injury, property damage, or wrongful death, the liability of each defendant for compensatory or punitive damages shall be several only and shall not be joint.

(b)(1) Each defendant shall be liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault.

(2) A separate several judgment shall be rendered against that defendant for that amount.

(c)(1) To determine the amount of judgment to be entered against each defendant, the court shall multiply the total amount of damages recoverable by the plaintiff with regard to each defendant by the percentage of each defendant's fault.

(2) That amount shall be the maximum recoverable against that defendant.

History. Acts 2003, No. 649, § 1.

RESEARCH REFERENCES

Ark. L. Rev. Recent Developments, 56 Ark. L. Rev. 703 (2003).

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Practice, Procedure, and Courts, Civil Justice Reform Act of 2003, 26 UALR L.J. 442.

Sizing Up a Multi-Party Tortfeasor Suit in Arkansas: A Tale of Two Laws — How Fault Is, and Should Be, Distributed, 26 UALR L.J. 251.

16-55-202. Assessment of percentages of fault.

(a) In assessing percentages of fault, the fact finder shall consider the fault of all persons or entities who contributed to the alleged injury or death or damage to property, tangible or intangible, regardless of whether the person or entity was or could have been named as a party to the suit.

(b)(1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if the defending party gives notice that a nonparty was wholly or partially at fault not later than one hundred twenty (120) days prior to the date of trial.

(2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

(c)(1) Except as expressly stated in this section, nothing in this section shall eliminate or diminish any defenses or immunities which currently exist.

(2) Assessments of percentages of fault of nonparties shall be used only for accurately determining the percentage of fault of named parties.

(3) Where fault is assessed against nonparties, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action.

History. Acts 2003, No. 649, § 2.

16-55-203. Increase in percentage of several share.

(a)(1) Notwithstanding the provisions of §§ 16-55-201 and 16-55-202, in the event a several judgment has been entered against multiple-

party defendants, a plaintiff may move the court no later than ten (10) days after the entry of judgment to determine whether all or part of the amount of the several share for which a defendant is liable will not be reasonably collectible.

(2) If the court determines, based upon a preponderance of the evidence, that any defendant's several share or multiple defendants' several shares will not be reasonably collectible, the court shall increase the percentage points of the several shares of each of the remaining defendants, subject to the limitations in subdivisions (a)(3) and (4) of this section.

(3)(A) If a defendant's percentage of fault is determined by the finder of fact to be ten percent (10%) or less, then the percentage points of that defendant's several share shall not be increased.

(B) If a defendant's percentage of fault is determined by the finder of fact to be greater than ten percent (10%) but less than fifty percent (50%), then the percentage points of that defendant's several share shall be increased by no more than ten (10) percentage points.

(C) If a defendant's percentage of fault is determined by the finder of fact to be fifty percent (50%) or greater, then the percentage points of that defendant's several share shall be increased by no more than twenty (20) percentage points.

(4) Under no circumstances shall the combined percentage points of the remaining defendants' several shares exceed the lesser of:

(A) A total of one hundred (100) percentage points; or

(B) The total number of percentage points remaining after deducting the percentage of fault of the plaintiff, if any.

(5) Any defendant whose several share has been increased pursuant to this section, and who has discharged his or her obligation to pay the increased several share, has a right of contribution from the defendants whose several shares were determined by the court to be not reasonably collectible.

(b) The provisions of subsection (a) of this section shall not apply to any punitive damages award or judgment.

History. Acts 2003, No. 649, § 3.

16-55-204. Applicability of § 16-55-203.

The provisions of § 16-55-203 shall not apply to a medical care provider who is named as a defendant in an action for personal injury, medical injury, or wrongful death based solely on his or her capacity as a medical director of a long-term care facility.

History. Acts 2003, No. 649, § 4.

16-55-205. Acting in concert.

(a) Notwithstanding § 16-55-201, a party is responsible for the fault of another person or entity or for payment of the proportionate share of another person or entity if both the party and the other person or entity

were acting in concert or if the other person or entity was acting as an agent or servant of the party.

(b)(1) As used in this section, “acting in concert” means entering into a conscious agreement to pursue a common plan or design to commit an intentional tort and actively taking part in that intentional tort.

(2) “Acting in concert” does not mean the act of any person or entity whose conduct was negligent in any degree other than intentional.

(3) A person’s or entity’s conduct which provides substantial assistance to one committing an intentional tort does not constitute “acting in concert” if the person or entity has not consciously agreed with the other to commit the intentional tort.

History. Acts 2003, No. 649, § 5.

16-55-206. Standards for award of punitive damages.

In order to recover punitive damages from a defendant, a plaintiff has the burden of proving that the defendant is liable for compensatory damages and that either or both of the following aggravating factors were present and related to the injury for which compensatory damages were awarded:

(1) The defendant knew or ought to have known, in light of the surrounding circumstances, that his or her conduct would naturally and probably result in injury or damage and that he or she continued the conduct with malice or in reckless disregard of the consequences from which malice may be inferred; and

(2) The defendant intentionally pursued a course of conduct for the purpose of causing injury or damage.

History. Acts 2003, No. 649, § 9.

RESEARCH REFERENCES

ALR. Exemplary or punitive damages for pharmacist’s wrongful conduct in preparing or dispensing medical prescription	— Cases not under Consumer Product Safety Act (15 U.S.C.A. § 2072). 109 ALR 5th 397.
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16-55-207. Burden of proof for award of punitive damages.

A plaintiff must satisfy the burden of proof required under § 16-55-206 by clear and convincing evidence in order to recover punitive damages from the defendant.

History. Acts 2003, No. 649, § 10.

RESEARCH REFERENCES

ALR. Exemplary or punitive damages for pharmacist’s wrongful conduct in preparing or dispensing medical prescription	— Cases not under Consumer Product Safety Act (15 U.S.C.A. § 2072). 109 ALR 5th 397.
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16-55-208. Limitations on the amount of punitive damages.

(a) Except as provided in subsection (b) of this section, a punitive damages award for each plaintiff shall not be more than the greater of the following:

(1) Two hundred fifty thousand dollars (\$250,000); or

(2) Three (3) times the amount of compensatory damages awarded in the action, not to exceed one million dollars (\$1,000,000).

(b) Subsection (a) of this section shall not apply when the finder of fact:

(1) Determines by clear and convincing evidence that, at the time of the injury, the defendant intentionally pursued a course of conduct for the purpose of causing injury or damage; and

(2) Determines that the defendant's conduct did, in fact, harm the plaintiff.

(c) As to the punitive damages limitations established in subsection (a) of this section, the fixed sums of two hundred fifty thousand dollars (\$250,000) set forth in subdivision (a)(1) of this section and one million dollars (\$1,000,000) set forth in subdivision (a)(2) of this section shall be adjusted as of January 1, 2006, and at three-year intervals thereafter, in accordance with the Consumer Price Index rate for the previous year as determined by the Administrative Office of the Courts.

History. Acts 2003, No. 649, § 11; § 1, amended this section as enacted by 2003, No. 1471, § 1.

A.C.R.C. Notes. Acts 2003, No. 1471,

Acts 2003, No. 649, § 11.

RESEARCH REFERENCES

ALR. Exemplary or punitive damages — Cases not under Consumer Product for pharmacist's wrongful conduct in preparing or dispensing medical prescription Safety Act (15 U.S.C.A. § 2072). 109 ALR 5th 397.

16-55-209. No right to punitive damages.

Nothing in § 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), 16-114-209, and 16-114-210 — 16-114-212 shall be construed as creating a right to an award of punitive damages.

History. Acts 2003, No. 649, § 12.

RESEARCH REFERENCES

ALR. Exemplary or punitive damages — Cases not under Consumer Product for pharmacist's wrongful conduct in preparing or dispensing medical prescription Safety Act (15 U.S.C.A. § 2072). 109 ALR 5th 397.

16-55-210. No limitation on certain judicial duties.

Nothing in § 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), 16-114-209, and 16-114-210 — 16-114-212 shall limit the duty of a court or the appellate courts to:

- (1) Scrutinize all punitive damages awards;
- (2) Ensure that all punitive damages awards comply with applicable procedural, evidentiary, and constitutional requirements; and
- (3) Order remittitur where appropriate.

History. Acts 2003, No. 649, § 13.

16-55-211. Bifurcated proceeding.

(a)(1) In any case in which punitive damages are sought, any party may request a bifurcated proceeding at least ten (10) days prior to trial.

(2) If a bifurcated proceeding has been requested by either party, then:

(A) The finder of fact first shall determine whether compensatory damages are to be awarded; and

(B) After a compensatory damages award determination, the finder of fact then shall determine whether and in what amount punitive damages will be awarded.

(b) Evidence of the financial condition of the defendant and other evidence relevant only to punitive damages is not admissible with regard to any compensatory damages determination.

History. Acts 2003, No. 649, § 14.

16-55-212. Compensatory damages.

(a) Section 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), 16-114-209, and 16-114-210 — 16-114-212 do not limit compensatory damages.

(b) Any evidence of damages for the costs of any necessary medical care, treatment, or services received shall include only those costs actually paid by or on behalf of the plaintiff or which remain unpaid and for which the plaintiff or any third party shall be legally responsible.

History. Acts 2003, No. 649, § 15.

16-55-213. Venue.

(a) All civil actions other than those mentioned in §§ 16-60-101 — 16-60-103, 16-60-107, 16-60-114, and 16-60-115, and subsection (e) of this section must be brought in any of the following counties:

(1) The county in which a substantial part of the events or omissions giving rise to the claim occurred;

(2)(A) The county in which an individual defendant resided.

(B) If the defendant is an entity other than an individual, the county where the entity had its principal office in this state at the time of the accrual of the cause of action; or

(3)(A) The county in which the plaintiff resided.

(B) If the plaintiff is an entity other than an individual, the county where the plaintiff had its principal office in this state at the time of the accrual of the cause of action.

(b)(1) The residence of any properly joined named class representative or representatives may be considered in determining proper venue in a class action.

(2) The residency of any putative or actual member of a class other than a named representative shall not be considered in determining proper venue for a class action.

(c) In any civil action, venue must be proper as to each or every named plaintiff joined in the action unless:

(1) The plaintiffs establish that they assert any right to relief against the defendants jointly, severally, or arising out of the same transaction or occurrence; and

(2) The existence of a substantial number of questions of law or material fact common to all those persons not only will arise in the action, but also that:

(A) The questions will predominate over individualized questions pertaining to each plaintiff;

(B) The action can be maintained more efficiently and economically for all parties than if prosecuted separately; and

(C) The interest of justice supports the joinder of the parties as plaintiffs in one (1) action.

(d)(1) Unless venue objections are waived by the defendant or by unanimous agreement of multiple defendants, if venue is improper for any plaintiff joined in the action, then the claim of the plaintiff shall be severed and transferred to a court where venue is proper.

(2)(A) If severance and transfer is mandated and venue is appropriate in more than one (1) court, a defendant sued alone or multiple defendants, by unanimous agreement, shall have the right to select another court to which the action shall be transferred.

(B) If there are multiple defendants who are unable to agree on another court, the court in which the action was originally filed may transfer the action to another court.

(e) Any action for medical injury brought under § 16-114-201 et seq. against a medical care provider, as defined in § 16-114-201(2), shall be filed in the county in which the alleged act or omission occurred.

History. Acts 2003, No. 649, § 16.

16-55-214. Maximum appeal bond in civil litigation.

(a) Appeal bonds shall be determined under § 16-68-301 et seq., and Arkansas Rules of Appellate Procedure — Civil, Rule 8, except that the maximum appeal bond that may be required in any civil action under any legal theory shall be limited to twenty-five million dollars (\$25,000,000), regardless of the amount of the judgment.

(b) If a party proves by a preponderance of the evidence that the party who has posted a bond in accordance with subsection (a) of this section is purposely dissipating or diverting assets outside of the ordinary course of its business for the purpose of evading ultimate payment of the judgment, the court may enter orders as are necessary

to prevent dissipation or diversion, including requiring that a bond be posted equal to the full amount of the judgment.

(c) Notwithstanding the provisions of § 16-55-220, the maximum appeal bond for any cause of action brought under any legal theory shall be limited to twenty-five million dollars (\$25,000,000), regardless of the amount of the judgment or the date the cause of action accrued, subject to the provisions of § 16-55-214(b).

History. Acts 2003, No. 649, § 17; **Amendments.** The 2005 amendment 2005, No. 1380, § 1. added (c).

16-55-215. Burden of proof.

Section 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), 16-114-209, and 16-114-210 — 16-114-212 do not amend the existing law that provides that the burden of alleging and proving fault is upon the person who seeks to establish fault.

History. Acts 2003, No. 649, § 6.

Cross References. Burden of proof, § 16-40-101.

16-55-216. Comparative fault.

Section 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), and 16-114-209 — 16-114-212 do not amend existing law that provides that a plaintiff may not recover any amount of damages if the plaintiff's own fault is determined to be fifty percent (50%) or greater.

History. Acts 2003, No. 649, § 7.

16-55-217. Cause of action not created.

(a) Section 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), and 16-114-209 — 16-114-212 do not create a cause of action.

(b) Section 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), and 16-14-209 — 16-114-212 do not alter the defenses or immunity of any person or entity.

History. Acts 2003, No. 649, § 8.

16-55-218. Attorney General.

No provision of § 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), and 16-114-209 — 16-114-212 shall apply to or alter existing law with respect to any claim, charge, action, or suit brought or prosecuted by the Attorney General.

History. Acts 2003, No. 649, § 23.

16-55-219. Coroner or medical examiner.

Nothing in § 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), and 16-114-209 — 16-114-212 shall be construed to diminish or enlarge the powers or duties of a coroner or medical examiner.

History. Acts 2003, No. 649, § 24.

16-55-220. Applicability and severability.

(a) Section 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), and 16-114-209 — 16-114-212 shall apply to all causes of action accruing on or after March 25, 2003.

(b) Section 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), and 16-114-209 — 16-114-212 shall not apply to any action filed or cause of action accruing prior to March 25, 2003.

(c) If any provisions of Section 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), and 16-114-209 — 16-114-212 or the application of § 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), and 16-114-209 — 16-114-212 to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of § 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), and 16-114-209 — 16-114-212 which can be given effect without the invalid provision or application, and to this end the provisions of § 16-55-201 et seq. and §§ 16-114-206(a), 16-114-208(a), 16-114-208(c)(1), and 16-114-209 — 16-114-212 are declared to be severable.

History. Acts 2003, No. 649, § 25.

CHAPTER 56**LIMITATION OF ACTIONS****SUBCHAPTER.**

1. GENERAL PROVISIONS.
2. UNIFORM CONFLICT OF LAWS LIMITATIONS ACT. [REPEALED.]

RESEARCH REFERENCES

Am. Jur. 51 Am. Jur. 2d, Lim. Act., § 1 **C.J.S.** 54 C.J.S., Lim. Act., § 1 et seq. et seq.

SUBCHAPTER 1 — GENERAL PROVISIONS**SECTION.**

16-56-101. Application of limitations —
Nonresidents.

SECTION.

16-56-102. Application of limitations —
Setoffs.

SECTION.

- 16-56-103. Actions not affected by Rev. Stat., Ch. 91.
- 16-56-104. Actions with limitation of one year.
- 16-56-105. Actions with limitation of three years.
- 16-56-106. Recovery of charges for medical services.
- 16-56-107. Enforcement of security interest in livestock.
- 16-56-108. Recovery of statutory penalties.
- 16-56-109. Actions against sheriffs, coroners, and other officials.
- 16-56-110. Sheriffs', coroners', and constables' bonds.
- 16-56-111. Notes and instruments in writing and other writings.
- 16-56-112. Design, planning, supervision, or observation of construction, repair, etc. — Actions for property damage, personal injury, or wrongful death.
- 16-56-113. Bonds of executors and administrators.
- 16-56-114. Judgments and decrees.
- 16-56-115. Limitation of actions not otherwise provided for.
- 16-56-116. Persons under disabilities at time of accrual of action.
- 16-56-117. Death of person entitled to sue or of a party.

SECTION.

- 16-56-118. Suspension of limitations — Persons in the armed forces.
- 16-56-119. Commencement of suit stayed by injunction — Effect.
- 16-56-120. Prevention of commencement of action by party.
- 16-56-121. Prevention of commencement of action — Foreign debtors absconding to this state.
- 16-56-122. Tolling statute — Verbal promise or acknowledgment insufficient.
- 16-56-123. Tolling statute — Endorsement of payment on bond or sealed instrument insufficient.
- 16-56-124. Tolling statute — Promise by joint contractor or executor.
- 16-56-125. Actions against tortfeasors whose identity is unknown.
- 16-56-126. Commencement of new action or filing mandate after nonsuit or arrest or reversal of judgment.
- 16-56-127. Mutual open accounts — Accrual of cause of action.
- 16-56-128. Guaranteed student loans.
- 16-56-129. [Repealed.]
- 16-56-130. Civil actions based on sexual abuse.

Cross References. Medical injury actions, § 16-114-203.

Product liability actions, § 16-116-103.

Wrongful death actions, § 16-62-102.

Effective Dates. Acts 1889, No. 70, § 2: effective on passage.

Acts 1891, No. 159, § 4: effective on passage.

Acts 1899, No. 123, § 2: effective on passage.

Acts 1939, No. 398, § 1: became law without Governor's signature, Mar. 30, 1939. Emergency clause provided: "Whereas, the county is in the midst of a period of adjustment and settlement of debts and demands by suits and otherwise an emergency is found and declared to exist and this act shall take effect and be in force from and after its passage."

Acts 1943, No. 159, § 3: Mar. 4, 1943.

Emergency clause provided: "That because many persons of this state are now in the armed forces of the United States government and are unable to protect their respective rights under the law, an emergency is declared to exist, and it being necessary, for the preservation of the public peace, health and safety, that this act go into immediate operation, this act shall be in force and effect from and after its approval."

Acts 1967, No. 471, § 3: Apr. 4, 1967. Emergency clause provided: "It is hereby found and determined by the General Assembly that civil actions for alienation of affection may now be brought within five (5) years after the cause of action accrues; that a five (5) year statute of limitations is unduly long and is conducive to the loss of valuable testimony and the dimming of

the memory of witnesses as to the event that gave rise to the original cause of action; and that in order to remedy this situation and to encourage the timely bringing of such actions, it is necessary that this Act become effective immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1985, No. 221, § 3: Feb. 28, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that the law amended by this Act has been the subject of misinterpretation resulting in inequitable treatment of many plaintiffs, and that this Act is immediately necessary to clarify that law. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1985, No. 894, § 3: Apr. 1, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that the statute of limitations prescribed by Act 638 of 1983 is too short; that this Act should be given effect on April 1, 1985 because it is vital that this Act go into effect on the most reasonably immediate date certain; that unless this emergency clause is adopted this Act will not go into effect until ninety days after recess or adjournment of the General Assembly; and that April 1, 1985 is the date by which this Act can reasonably be expected to have been enacted. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary

for the preservation of the public peace, health and safety shall be in full force and effect on and after April 1, 1985."

Acts 1989 (3rd Ex. Sess.), No. 46, § 11: approved Nov. 14, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is an urgent need to validate otherwise legal marriages declared void by court decisions, to declare and preserve the legitimacy of the children born of such marriages, and to validate all property rights between the parties themselves and third persons; that it is in the best interest of the state that this act declaring such marriages take effect immediately. It is further determined that it is in the best interest of the state that the actions of alienation of affection and criminal conversation be abolished immediately. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage."

Acts 2003, No. 1328, § 7: July 1, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that proper registration and monitoring of the home inspectors in this state is vital to the protection of Arkansas home owners; that the current home inspector laws are not adequate and do not properly fund this important government function; and that this act is essential that a functioning Home Inspector Registration Board be in place at the beginning of the fiscal year to receive its funds to properly monitor Arkansas home inspectors. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2003."

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Malpractice of attorney: what statute of limitations governs damage actions. 2 ALR 4th 284.

What statute of limitations governs action arising out of transaction consum-

mated by use of credit card. 2 ALR 4th 677.

Statute of limitations in dental malpractices. 3 ALR 4th 318.

Restrictive language of debtor accompanying part payment as presenting interruption of statute of limitations. 10 ALR 4th 932.

Limitation of actions involving defects

in houses or other buildings caused by soil instability. 12 ALR 4th 866.

Consumer protection or state deceptive trade practices act: when statute commences to run. 18 ALR 4th 430.

Air pollution: when statute of limitations begins to run as to cause of action for nuisance. 19 ALR 4th 456.

Dissolved corporation: time for bringing action against former director, etc., for personal injuries incurred after final dissolution. 20 ALR 4th 414.

Inverse condemnation: state statute of limitations. 26 ALR 4th 68.

Tolling in favor of one commencing action despite existing disability. 30 ALR 4th 1092.

When statute begins to run upon action

against attorney for malpractice. 32 ALR 4th 260.

Limitation of actions for invasion of right of privacy. 33 ALR 4th 429.

Time of discovery of defamation as determining accrual of action. 35 ALR 4th 1002.

Statute of limitations applicable to third person's action against psychiatrist, psychologist, or other mental health practitioner, based on failure to warn persons against whom patient expressed threats. 41 ALR 4th 1078.

Contesting will or its probate: fraud as extending statutory limitations period for. 48 ALR 4th 1094.

Time of discovery as affecting running of statute of limitations in wrongful death action. 49 ALR 4th 972.

16-56-101. Application of limitations — Nonresidents.

This act and all other acts of limitations in force on December 14, 1844, shall apply to nonresidents as well as residents of this state.

History. Acts 1844, § 3, p. 24; C. & M. Dig., § 6962; Pope's Dig., § 8940; A.S.A. 1947, § 37-230.

Meaning of "this act". Acts Dec. 14,

1844, p. 24, codified as §§ 16-56-101, 16-56-110, 16-56-111, 16-56-113, 16-56-114, 16-56-116, 16-56-121.

CASE NOTES

Effect.

Unless the statute of limitations makes an exception, its operation will not be suspended during the absence from the

state or nonresidence of either a creditor or a debtor. *Rock Island Plow Co. v. Masterson*, 96 Ark. 446, 132 S.W. 216 (1910).

16-56-102. Application of limitations — Setoffs.

The provisions of this act shall be deemed and taken to apply to the case of any demand alleged by way of setoff on the part of any defendant, either by plea, notice, or otherwise. However, any demand, right, or cause of action, regardless of how it may have arisen, may be asserted by way of setoff in any action to the extent of the plaintiff's demand.

History. Rev. Stat., ch. 91, § 33; C. & M. Dig., § 6978; Pope's Dig., § 8956; Acts 1939, No. 398, § 1; A.S.A. 1947, § 37-233.

Meaning of "this act". Rev. Stat., ch. 91, codified as §§ 4-59-101(c), 16-56-102

— 16-56-105, 16-56-108, 16-56-109, 16-56-115 — 16-56-117, 16-56-119, 16-56-120, 16-56-122 — 16-56-124, 16-56-126, 16-56-127, 18-11-104, 18-61-102, 18-61-105.

CASE NOTES

ANALYSIS

In general.
Construction.
Alimony and child support.
Counterclaims.

In General.

When a plaintiff brings suit upon a claim arising from a certain transaction, the defendant may successfully assert a setoff that arose from a different transaction even though the claim would have been barred by the statute of limitations when the plaintiff's cause of action accrued. *Little Rock Crate & Basket Co. v. Young*, 284 Ark. 295, 681 S.W.2d 388 (1984).

Construction.

Although this section and § 16-65-603(a) permit judgments to be set off against each other, § 16-63-206(c) prevents the setoff of judgments assigned to the defendant after suit has been commenced against him. *Donoho v. Donoho*, 318 Ark. 637, 887 S.W.2d 290 (1994).

This section and § 16-65-603(a) are provisions generally authorizing that a demand, right or course of action may be asserted by setoff and also permitting money judgments to be set off (having due regard to the legal and equitable rights of all persons interested in both judgments),

while § 16-63-206(c) is a specific provision governing the timeliness of setoffs, disallowing those judgments assigned to a defendant after the plaintiff commenced suit against the defendant; because these three provisions can be read in harmony, neither this section nor § 16-65-603(a) impliedly repeal § 16-63-206(c). *Donoho v. Donoho*, 318 Ark. 637, 887 S.W.2d 290 (1994).

Alimony and Child Support.

Statute of limitations did not bar former wife's claim for unpaid alimony and child support asserted as a defensive setoff against husband's claim to one half of the sales proceeds from a judicial sale of the house, although the amount of setoff would be limited to the amount of the husband's claim and any excess would be barred. *Jones v. Jones*, 22 Ark. App. 179, 737 S.W.2d 654 (1987).

Counterclaims.

There is no logical reason why a setoff should not serve as an affirmative defense to a counterclaim as well as to an original complaint, a crossclaim, or a third-party claim. *Turner v. Eubanks*, 26 Ark. App. 22, 759 S.W.2d 37 (1988).

Assertion of a compulsory counterclaim does not act as a waiver of the statute of limitations. *Smith v. Elder*, 312 Ark. 384, 849 S.W.2d 513 (1993).

16-56-103. Actions not affected by Rev. Stat., Ch. 91.

(a) The provisions of this act shall not extend to any action which is or shall be otherwise limited by any statute, but the action shall be brought within the time limited by the statute.

(b) None of the provisions of this act shall apply to suits brought to enforce payment on bills, notes, or evidences of debt issued by any bank or moneyed corporation.

History. Rev. Stat., ch. 91, §§ 18, 28; C. & M. Dig., §§ 6967, 6976; Pope's Dig., §§ 8945, 8954; A.S.A. 1947, §§ 37-214, 37-232.

Meaning of "this act". See note to § 16-56-102.

CASE NOTES

Evidence of Debt.

Deposit slips were not evidences of debt. *England v. Hughes*, 141 Ark. 235, 217 S.W. 13 (1919).

Under the express terms of subsection (b) of this section, § 16-56-111(b) does not apply to suits to enforce payment of any bills, notes, or evidences of any debt is-

sued by any bank. *Ernest F. Loewer, Jr. Farms, Inc. v. National Bank*, 316 Ark. 54, 870 S.W.2d 726 (1994).

16-56-104. Actions with limitation of one year.

The following actions shall be commenced within one (1) year after the cause of action shall accrue and not thereafter:

- (1) All special actions on the case;
- (2) Actions for:
 - (A) Assault and battery; and
 - (B) False imprisonment;
- (3) All actions for words spoken slandering the character of another;
- (4) All actions for words spoken whereby special damages are sustained; and
- (5) All actions for damages suffered by a consumer as a result of any act or omission of a home inspector relating to a home inspection report.

History. Rev. Stat., ch. 91, § 7; C. & M. Dig., § 6951; Pope's Dig., § 8929; Acts 1967, No. 471, § 1; A.S.A. 1947, § 37-201; Acts 1989 (3rd Ex. Sess.), No. 46, § 7; 2003, No. 1328, § 3.

A.C.R.C. Notes. Acts 2003, No. 1328, § 5, provided: "All regulations adopted by the Homes Inspector Advisory Board under § 17-52-107 shall remain in effect until the new Arkansas Inspector Registration Board adopts regulations, unless the regulations conflict with this act."

Publisher's Notes. With regard to the

words "special actions on the case", see ARCP 2, which provides for one form of action.

Acts 1989 (3rd Ex. Sess.), No. 46, § 8, provided that § 7 of the act does not apply to litigation pending before the effective date of the act.

Amendments. The 2003 amendment added (5); and made related and stylistic changes.

Cross References. Arkansas Home Inspectors Registration Act, § 17-52-301 et seq.

RESEARCH REFERENCES

UALR L.J. Survey, Family Law, 12 UALR L.J. 631.

CASE NOTES

ANALYSIS

Purpose.

Alienation of affections.

Assault and battery.

Civil rights violation.

Contractual interference.

Deceit.

Defamation.

False imprisonment, etc.

Husband and wife.

Invasion of privacy.

Malpractice.

Personal injuries.

Slander.

Special actions on the case.

Wrongful killing.

Purpose.

The purpose of a statute of limitations is to encourage the prompt filing of claims by allowing no more than a reasonable time within which to make a claim so a defendant is protected from having to defend an action in which the truth-finding process would be impaired by the passage of time. *McEntire v. Malloy*, 288 Ark. 582, 707 S.W.2d 773 (1986).

Alienation of Affections.

Prior to the 1967 amendment, this section did not apply in a suit for alienation of affections, the court holding that there was a clear distinction between the two separate torts of alienation of affection

and criminal conversation. *Gibson v. Gibson*, 240 Ark. 827, 402 S.W.2d 647 (1966).

Plaintiffs' suit for alienation of a child's affection was barred by this section since the suit was filed well beyond the one year limit. *Orlando v. Alamo*, 646 F.2d 1288 (8th Cir. 1981).

Assault and Battery.

Cause of action not barred by one year statute of limitation, but subject to three year statute of limitation. *Saint Louis, I.M. & S. Ry. v. Mynott*, 83 Ark. 6, 102 S.W. 380 (1907); *Jefferson v. Nero*, 225 Ark. 302, 280 S.W.2d 884 (1956).

An action for damages for shooting another person is an assault and battery and barred in one year even though there could have been a conviction for a higher crime. *McAlister v. Gunter*, 164 Ark. 611, 262 S.W. 636 (1924).

Where no special relationship existed between plaintiff and defendant and damages claimed by plaintiff were the result of alleged assault and battery, action is governed by the one year statute of limitations. *Tollett v. Mashburn*, 183 F. Supp. 120, aff'd, 291 F.2d 89 (W.D. Ark. 1960).

Where the plaintiff was severely beaten by her husband in 1982, but did not discover the extent of her injuries until 1984, and she filed a personal injury action in 1985, the statute of limitations began to run when the battery was allegedly committed and the judge was correct in dismissing the action. *McEntire v. Malloy*, 288 Ark. 582, 707 S.W.2d 773 (1986).

Action for civil damages arising from a shooting involved a battery, not a trespass, and was barred when not brought within the limitations period. *Andrews v. McDougal*, 292 Ark. 590, 731 S.W.2d 779 (1987).

Allegations that a doctor had improperly touched, examined, and otherwise fondled plaintiffs' breasts during a physical examination did not allege a complaint of battery, governed by the one-year statute of limitations in this section, but stated a cause of action for the tort of outrage, which is governed by the three-year statute of limitations in § 16-56-105. *McQuay v. Guntharp*, 331 Ark. 466, 963 S.W.2d 583 (1998).

Civil Rights Violation.

Allegation of deprivation of rights in violation of federal statute must bring

action within statute of limitations most analogous to claim, which in this case would be as provided in § 16-56-105 rather than one year as provided in this section. *Reed v. Hutto*, 486 F.2d 534 (8th Cir. 1973).

Actions under 42 U.S.C. § 1983 accruing within a particular state are to be governed by that state's general personal-injury statute of limitations, not by statutes covering particular torts such as this one-year statute of limitations. The general personal-injury statute of limitations of three years governs § 1983 actions. *Ketchum v. City of W. Memphis*, 974 F.2d 81 (8th Cir. 1992).

Contractual Interference.

The limitation period for a contractual interference claim is three years, not one year. *Bishop v. Tice*, 622 F.2d 349 (8th Cir. 1980).

Deceit.

Although similar to an action for defamation, an action for deceit is distinct and is covered by the three year statute of limitations, not the one year statute. *Bishop v. Tice*, 622 F.2d 349 (8th Cir. 1980).

Defamation.

In an action to recover damages for unrecorded defamation of character and reputation, the complaint stated a cause of action for slander which was barred by the one year statute of limitations. *Parkman v. Hastings*, 259 Ark. 59, 531 S.W.2d 481 (1976).

False Imprisonment, Etc.

Under this section an action alleging false imprisonment must be commenced within one year after the cause of action accrued. *Gilpin v. Tack*, 256 F. Supp. 562 (W.D. Ark. 1966).

Complaint asserting false imprisonment, assault and battery, and intentional infliction of mental and emotional distress was barred by the one year statute of limitations applicable to actions for false imprisonment and for assault and battery, and since no facts were alleged that would make the assertion of mental and emotional distress anything more than an element of damage flowing from the imprisonment and mistreatment, the same one year statute would apply. *Turner v. Baptist Medical Center*, 275 Ark. 424, 631 S.W.2d 275 (1982).

Husband and Wife.

Where wife's cause of action is barred by the statute of limitations, her husband's claim for damages based on wife's cause of action is also barred. *Tollett v. Mashburn*, 183 F. Supp. 120, aff'd, 291 F.2d 89 (W.D. Ark. 1960).

Invasion of Privacy.

Only torts not enumerated in this section have the three year limitation period of § 16-56-105. The reason there must be a short limitation period of one year for actions based on spoken words which allegedly constitute invasion of privacy is simple: there is no written proof of the claim and such an action ought to be quickly resolved. This effects the underlying purpose of statutes of limitations; that is, to settle claims within a reasonable period of time after they arise and while the evidence is fresh in the witnesses' minds. *Dunlap v. McCarty*, 284 Ark. 5, 678 S.W.2d 361 (1984).

Malpractice.

The statute of limitations begins to run at the time the act of malpractice occurs, not from the time it is discovered. *Courtney v. First Nat'l Bank*, 300 Ark. 498, 780 S.W.2d 536 (1989).

Personal Injuries.

An action by a husband for damages suffered in consequence of wrongful injury to his wife is not barred in one year. *Emrich v. Little Rock Traction & Elec. Co.*, 71 Ark. 71, 70 S.W. 1035 (1902).

An action by a parent for damages for seduction of child is tort action for personal injuries, and the one-year statute does not apply. *Breining v. Lippincott*, 125 Ark. 77, 187 S.W. 915 (1916).

Slander.

Subdivision (4) provides that actions for slander shall be commenced within one year after the cause of action accrues, which is the time of publication. *Pinkston v. Lovell*, 296 Ark. 543, 759 S.W.2d 20 (1988).

Plaintiffs' slander claim was time-barred where it was not brought within one year of publication and where the plaintiffs presented no evidence that the defendants acted to fraudulently conceal the allegedly slanderous statement. *Milam v. Bank of Cabot*, 327 Ark. 256, 937 S.W.2d 653 (1997).

Special Actions on the Case.

The words "all special actions on the case" are limited to actions for criminal conversation. *Emrich v. Little Rock Traction & Elec. Co.*, 71 Ark. 71, 70 S.W. 1035 (1902). See also *Cockrill v. Cooper*, 86 F. 7 (8th Cir. 1898).

Wrongful Killing.

This section has no applicability to an action brought under § 16-62-101 for wrongful killing. *Saint Louis, I.M. & S. Ry. v. Robertson*, 103 Ark. 361, 146 S.W. 482 (1912).

Cited: *Heuer v. Basin Park Hotel & Resort*, 114 F. Supp. 604 (W.D. Ark. 1953); *Crawford v. General Contract Corp.*, 174 F. Supp. 283 (W.D. Ark. 1959); *Glasscoe v. Howell*, 431 F.2d 863 (8th Cir. 1970); *Martin v. Georgia-Pacific Corp.*, 568 F.2d 58 (8th Cir. 1977); *Phillips v. Sugrue*, 800 F. Supp. 789 (E.D. Ark. 1992); *Jackson v. Swift-Eckrich*, 830 F. Supp. 486 (W.D. Ark. 1993), aff'd sub nom. *Jackson v. Swift-Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995); *O'Mara v. Dykema*, 328 Ark. 310, 942 S.W.2d 854 (1997); *Miller v. Compton*, 122 F.3d 1094 (1997).

16-56-105. Actions with limitation of three years.

The following actions shall be commenced within three (3) years after the cause of action accrues:

(1) All actions founded upon any contract, obligation, or liability not under seal and not in writing, excepting such as are brought upon the judgment or decree of some court of record of the United States or of this or some other state;

(2) All actions for arrearages of rent not reserved by some instrument in writing, under seal;

(3) All actions founded on any contract or liability, expressed or implied;

- (4) All actions for trespass on lands;
- (5) All actions for libels; and
- (6) All actions for taking or injuring any goods or chattels.

History. Rev. Stat., ch. 91, § 6; C. & M. Dig., § 6950; Pope's Dig., § 8928; A.S.A. 1947, § 37-206.

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CASE NOTES

ANALYSIS

Applicability.

Accountants.

Actions for accounting.

Attorneys.

Burden of proof.

Child support.

Cities.

Civil rights.

Commencement.

Contracts generally.

— Contractual interference.

— Oral contracts.

— Real property improvements.

— Third party beneficiaries.

Corporations.

Counties.

Debts.

— Accounts.

Decedents' estates.

Employment contracts.

Federal preemption.

Fraud and deceit.

Goods and chattel.

— Bailments.

— Conversion.

Implied liability.

Insurance.

Knowledge.

Libel.

Malpractice.

Miscellaneous.

Pleadings.

Property damage.

— Ditches, embankments, etc.

— Dumps.

— Power plants.

— Removals from land.

Real estate interests.

— Abstractors.

Recovery of money.

Service of process.

Taxes.

Tolling of statute.

Torts.

— Outrage.

Trespass.

Applicability.

In an action involving fraud and a written instrument, the court looks to the gist

of the action as alleged to determine which statute of limitations applies. *Ernest F. Loewer, Jr. Farms, Inc. v. National Bank*, 316 Ark. 54, 870 S.W.2d 726 (1994).

In a claim where it was unclear whether plaintiffs were complaining of the circumstances surrounding the execution of a 1993 agreement, or seeking to enforce a 1981 contract breached in 1996, summary judgment based on the running of the 3 year statutes of limitations was improper. *Ingram v. Chandler*, 63 Ark. App. 1, 971 S.W.2d 801 (1998).

Enforcement of environmental regulations intended to improve the environment for the benefit of the public are rights that belong to the public, and the Arkansas Department of Environmental Quality (DEQ) represented the public at large; therefore, the State's exemption from the statute of limitations under subsection (3) of this section did not bar the DEQ's Remedial Action Trust Fund Act, § 8-7-501 et seq., and Arkansas Hazardous Waste Management Act, § 8-7-201 et seq., claims against the customers of the corporation, which was improperly disposing of hazardous wastes. *Ark. Dep't of Env'tl. Quality v. Brighton Corp.*, 352 Ark. 396, 102 S.W.3d 458 (2003).

In a dispute brought by condominium owners against corporations who were successors-in-interest to the original developers, the corporations attempted to argue that the owners' constructive fraud claim was barred by the statute of limitations, however, the court found that the more specific provisions in § 18-14-403 controlled over the more general statute of limitations in this section. *Nat'l Enters. v. Kessler*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 459 (July 1, 2005).

Accountants.

The performance of audits in consecutive fiscal years is not presumptively a course of providing professional services that would call for the application of the continuous treatment doctrine. *FDIC v. Deloitte & Touche*, 834 F. Supp. 1129 (E.D. Ark. 1992).

The negligence statute of limitations applied to the clients' breach of contract action against their accountants, where the accountants' promise to represent the clients with diligence was not sufficiently specific to create a contract, and any violation of that promise was, by definition,

negligence. *Tony Smith Trucking v. Woods & Woods, Ltd.*, 75 Ark. App. 134, 55 S.W.3d 327 (2001).

Actions for Accounting.

An action for an accounting of property held by one of three purchasers as trustee, brought after the death of the trustee which was 15 years after the time of purchase, was not barred. *Lasker-Morris Bank & Trust Co. v. Gans*, 132 Ark. 402, 200 S.W. 1029 (1918).

The three year statute is applicable to an action for an accounting between partners. *Williams v. Walker*, 148 Ark. 49, 229 S.W. 28 (1921).

If the three year statute of limitations is applicable to a suit against a county treasurer to require an accounting of fees and emoluments, the statute begins to run not from the date when the treasurer should have filed his annual settlement but from the date he actually filed it. *McCoy v. State*, 190 Ark. 297, 79 S.W.2d 94 (1935).

Mother's acceptance of care for ten years did not bar her from seeking accounting, and trial court correctly applied five year, rather than three year, statute of limitations to accounting since caregiver's obligation arose from written deeds, not oral or implied promise. *Cluck v. Mack*, 278 Ark. 506, 647 S.W.2d 442 (1983).

Attorneys.

The statute does not begin to run against an attorney's claim for fees until the relation of attorney and client is terminated. *McNeil v. Garland & Nash*, 27 Ark. 343 (1871).

The statute begins to run in favor of an attorney failing to pay over money from the time demand might have been reasonably made. *Whitehead v. Wells*, 29 Ark. 99 (1874); *Leigh v. Williams*, 64 Ark. 165, 41 S.W. 323 (1897); *Crissman v. Carl Lee*, 132 Ark. 32, 200 S.W. 133 (1918).

The statute begins to run in favor of an attorney guilty of negligence or misconduct from the date of the offense. *White v. Reagan*, 32 Ark. 281 (1877).

An action to recover an attorney's fee is barred after three years. *Parker v. Carter*, 91 Ark. 162, 120 S.W. 836 (1909); *Kinthead v. Estate of Kinthead*, 51 Ark. App. 159, 912 S.W.2d 442 (1995).

The statute does not begin to run against an attorney claiming compensa-

tion for services in prosecuting a suit until the final determination of the suit. *Boyn-ton v. Brown*, 103 Ark. 513, 145 S.W. 242 (1912).

Lien of attorney of estate could not be asserted eight years after land was sold, subject to lien of attorney. *Tellier v. Darragh*, 220 Ark. 363, 247 S.W.2d 960 (1952).

This section setting a three year limitations period governs the period for bringing attorney malpractice claims; and the cause of action arises when the alleged negligent act occurs, not when client discovers it. *Cotton v. Mosele*, 738 F.2d 338 (8th Cir. 1984).

The statute of limitations in an action against an attorney for negligence begins to run, in the absence of concealment of the wrong, when the negligence occurs, not when it is discovered by the client. *Riggs v. Thomas*, 283 Ark. 148, 671 S.W.2d 756 (1984); *Goldsby v. Fairley*, 309 Ark. 380, 831 S.W.2d 142 (1992).

The misconduct or negligence of an attorney triggers the statute of limitations. *Rhoades v. Sims*, 286 Ark. 349, 692 S.W.2d 750 (1985).

A legal malpractice claim based on the drafting of a partnership agreement in 1991 was time-barred where the complaint was filed in July, 1996. *Dunn v. Westbrook*, 334 Ark. 83, 971 S.W.2d 252 (1998).

A legal malpractice claim based on the revision of a partnership agreement on July 8, 1993 was not time-barred where the complaint was filed on July 5, 1996. *Dunn v. Westbrook*, 334 Ark. 83, 971 S.W.2d 252 (1998).

A malpractice suit alleging that the defendant attorneys breached their contract by failing to act with diligence as required by the contract is an action for negligence rather than for breach of contract, and the three year statute of limitations should apply. *Sturgis v. Skokos*, 335 Ark. 41, 977 S.W.2d 217 (1998).

Court properly found that an attorney's action against a client to recover fees was not barred by the three-year statute of limitations because the client admitted that payments were made in 1998 and 2001, and each payment extended the limitations period for three years. *North-west Ark. Recovery, Inc. v. Davis*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 957 (Dec. 15, 2004).

Burden of Proof.

Where statute is pleaded in action on account, burden is on plaintiff to show it is not barred. *Watkins v. Martin*, 69 Ark. 311, 65 S.W. 103 (1901).

Defendant invoking this statute has the burden of proof to bring himself within its terms. *Smith v. Milam*, 195 Ark. 157, 110 S.W.2d 1062 (1937).

Where executor pleaded the statute of limitations as a bar to claim against decedent's estate for amount of loans made to decedent, the burden was on claimant to show that the running of the statute had been tolled or revived by payment or otherwise. *Taylor v. Merchants Nat'l Bank*, 236 Ark. 672, 367 S.W.2d 747 (1963).

Child Support.

This action does not apply to recovery of delinquent child support payments. *Brun v. Rembert*, 227 Ark. 241, 297 S.W.2d 940 (1957).

The period of time for which the mother may recover for the reasonable and definite amount she has expended for the support of the children is governed by the language of the original divorce decree and where, as in the present case, there was no provision in the original divorce decree for support, the obligation of the father was one express or implied not in writing and would therefore come within the three year statute for such definite amounts as she had expended for the support of the minor children. *Wilder v. Garner*, 235 Ark. 400, 360 S.W.2d 192 (1962).

Although the three year statute of limitations was applicable to a paternity proceeding which was commenced more than four years after birth of the child, the statute of limitations did not bar the entire cause of action, but only recovery of support for the period more than three years prior to the filing of the complaint. *Winston v. Robinson*, 270 Ark. 996, 606 S.W.2d 757 (1980).

Where mother brought action for support of illegitimate child against putative father more than five years after the child's birth, it was error to grant the father summary judgment, since the child is the real party in interest and should thus not be barred by the mother's failure to bring the action. *Dozier v. Veasley*, 272 Ark. 210, 613 S.W.2d 93 (1981).

Cities.

Three-year statute of limitations ap-

plied to city's obligation to pay holiday compensation to its employees. *City of Pochontas v. Huddleston*, 309 Ark. 353, 831 S.W.2d 138 (1992).

Civil Rights.

In an action for alleged deprivation of civil rights as a result of the arrest of defendant with alleged unnecessary force and violence, either the three year statute of limitations for actions founded on contract or liability, which has been construed to cover liability created by statute, or the five year general statute of limitations was applicable, and since the action was instituted within the statutory period of both statutes, it was timely. *Glasscoe v. Howell*, 431 F.2d 863 (8th Cir. 1970).

This section was the governing statute of limitations in a suit under 42 U.S.C. § 1981 for discriminatory employment practices, since 42 U.S.C. § 1981 creates statutory liabilities. *Martin v. Georgia-Pacific Corp.*, 568 F.2d 58 (8th Cir. 1977).

Where plaintiffs alleged both class-based and incidental individual sex and race discrimination in connection with hiring, wages, promotion and job assignment, and the employment discrimination in issue was only such as would amount to a deprivation of constitutional rights, the district court correctly applied the three year limitations period. *Marshall v. Kirkland*, 602 F.2d 1282 (8th Cir. 1979).

Where the plaintiff brought a civil rights complaint involving the termination of the plaintiff's written employment contract, this section was the applicable statute of limitations, not § 16-56-111(a), which governs actions on written contracts. *Wagh v. Dennis*, 677 F.2d 666 (8th Cir. 1982).

Because 42 U.S.C. § 1983 does not contain its own statute of limitations, the general rule is to apply the state statute of limitations governing actions most analogous to the civil rights claim being asserted; therefore, in Arkansas, § 1983 claims are subject to the three year limitation found in this section. *Weston v. Bachman*, 682 F.2d 202 (8th Cir. 1982), cert. denied, 464 U.S. 824, 104 S. Ct. 93, 78 L. Ed. 2d 99 (1983); *Whittle v. Wiseman*, 683 F.2d 1128 (8th Cir. 1982).

Trial court properly applied the three year statute of limitations of this section in dismissing civil rights action against federal employees. *Roach v. Owen*, 689 F.2d 146 (8th Cir. 1982).

This section was the applicable statute of limitations for a civil rights action brought pursuant to either 42 U.S.C. § 1981 or 42 U.S.C. § 1983. *Gilbert v. City of Little Rock*, 544 F. Supp. 1231 (E.D. Ark. 1982), aff'd in part and rev'd on other grounds in part, 722 F.2d 1390 (8th Cir. 1983), cert. denied, 466 U.S. 972, 104 S. Ct. 2347, 80 L. Ed. 2d 820 (1984).

This section is the appropriate statute of limitations for employment discrimination actions brought under 42 U.S.C. § 1981. *McDowell v. Safeway Stores, Inc.*, 575 F. Supp. 1007 (E.D. Ark. 1983).

The limitations period in a civil rights action under 42 U.S.C. § 1983 is the state statute of limitations for personal injury actions; thus, in Arkansas the applicable period is three years. Where a federal cause of action is involved, filing a complaint with the court commences the action pursuant to Rule 3 of the Federal Rules of Civil Procedure, and tolls the statute of limitations; for purposes of the statute of limitations, a complaint is "filed" when it is lodged with the court even though it is technically deficient under local rules. *Lyons v. Goodson*, 787 F.2d 411 (8th Cir. 1986).

Former employee's claim of race discrimination under 42 U.S.C.S. § 1981 was governed by three-year statute of limitations applicable to personal injury actions, not the one-year statute of limitations contained in the Arkansas Civil Rights Act, § 16-123-107(c)(3), and the employer's motion to dismiss was denied; as racial discrimination was a fundamental injury to the rights of a person, 42 U.S.C.S. § 1981 claims were, in essence, personal injury claims. *Thompson v. Wal-Mart Stores, Inc.*, 314 F. Supp. 2d 842 (W.D. Ark. 2004).

Commencement.

This section begins to run when the negligent act occurs. *Stroud v. Ryan*, 297 Ark. 472, 763 S.W.2d 76 (1989); *Courtney v. First Nat'l Bank*, 300 Ark. 498, 780 S.W.2d 536 (1989).

The statute of limitations begins to run when there is a complete and present cause of action. *Courtney v. First Nat'l Bank*, 300 Ark. 498, 780 S.W.2d 536 (1989).

A cause of action accrues the moment the right to commence an action comes into existence, and the statute of limita-

tions commences to run from that time. *Courtney v. First Nat'l Bank*, 300 Ark. 498, 780 S.W.2d 536 (1989).

The bank's negligence in failing to properly establish a survivorship account occurred when it issued the final certificate and the surviving joint tenant's claim began to accrue at that time. *Smackover State Bank v. Oswalt*, 307 Ark. 432, 821 S.W.2d 757 (1991).

The limitations period found in subdivision (3) begins to run when there is a complete and present cause of action, and, in the absence of concealment of the wrong, when the injury occurs, not when it is discovered. *Chalmers v. Toyota Motor Sales, USA, Inc.*, 326 Ark. 895, 935 S.W.2d 258 (1996).

The statute of limitations applicable to the clients' malpractice action against their accountants began running, in the absence of concealment of the wrong, when the negligence occurred, not when it was discovered. *Tony Smith Trucking v. Woods & Woods, Ltd.*, 75 Ark. App. 134, 55 S.W.3d 327 (2001).

Court did not err in denying the State's motion for a JNOV where the statute of limitations did not begin to accrue against a gas station until it learned that gasoline contamination was caused, not by it, but by another gas station. *State v. Diamond Lakes Oil Co.*, 347 Ark. 618, 66 S.W.3d 613 (2002).

Dismissal of borrowers' claims for fraud, civil conspiracy, unjust enrichment, and violations of federal law for failure to state a claim was affirmed where it was apparent from the complaint that the applicable statutes of limitations had all run and no basis for tolling was presented. *Varner v. Peterson Farms*, 371 F.3d 1011 (8th Cir. 2004).

Contracts Generally.

This section applies to actions on all contracts, expressed or implied, which are not in writing and has regularly been applied to incidental obligations implied from written contracts. *Scroggin Farms Corp. v. Howell*, 216 Ark. 569, 226 S.W.2d 562 (1950).

Where there was no provision that caused the entire obligation to become automatically accelerated by the first default on a sales contract and subsequent defaults were within the period of this section, the statute of limitations could

not be invoked as a bar to rescission. *Hogue v. Pellerin Laundry Mach. Sales Co.*, 353 F.2d 772 (8th Cir. 1965).

The plaintiff's breach of contract claim based on an oral promise to hire her as a teacher was time barred, since this section provides for a three-year statute of limitation for oral contracts. *Crutchfield v. Pulaski County Special Sch. Dist.*, 647 F. Supp. 884 (E.D. Ark. 1986).

Where the parties have entered into an agreement which requires a series of mutual acts, some unilateral and some bilateral in character, and have left the time of those acts open-ended, the cause of action does not accrue until one party has by word or conduct indicated to the other a repudiation of the agreement. *Chadwell v. Pannell*, 27 Ark. App. 59, 766 S.W.2d 38 (1989).

Trial court did not err in finding that written contract had been so altered by oral modification as to constitute a new oral contract subject to the three-year statute of limitations provided in this section, and action was therefore barred. *Davis v. Patel*, 32 Ark. App. 1, 794 S.W.2d 158 (1990).

A breach of contract action was barred by the statute of limitations where, by the plaintiff's own admission, she was on notice of the alleged breach in January, 1989 and the action was commenced in December, 1993. *Elder v. Security Bank*, 68 Ark. App. 132, 5 S.W.3d 78 (1999).

Statute of limitations found in this section did not bar an action on an indemnification provision in a contract between a general contractor and a subcontractor because the action accrued on the date that the general contractor wired a settlement to the customer, and the general contractor filed its second amended complaint against the subcontractor within five years of that date. *Ray & Sons Masonry Contrs., Inc. v. United States Fid. & Guar. Co.*, 353 Ark. 201, 114 S.W.3d 189 (2003).

Where the husband of a beneficiary under her parents' first mutual wills brought a tortious interference with contract suit against the beneficiaries under a second will, that right of action accrued in November 1999 when the will-contest was filed seeking probate of decedent's second will, however, the husband did not file his suit until April 2003, and the trial court did not err in dismissing the action be-

cause the three year statute of limitations had run. *Shelnutt v. Laird*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 746 (Dec. 2, 2004).

Where the only documents that evidenced a loan between a lender and a borrower were the cashier's check and a transaction record of partial payments that had been made, the breach of contract action by the lender was governed by the three year statute of limitations. *Cobb v. Leyendecker*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 39 (Jan. 12, 2005).

—Contractual Interference.

The limitation period for a contractual interference claim is three years. *Bishop v. Tice*, 622 F.2d 349 (8th Cir. 1980).

—Oral Contracts.

Where a plain reading of resolution authorizing city manager to award franchise to wrecker service indicated that the city had not contractually bound itself in writing but had only authorized the city manager to award a contract to wrecker service, and where there was no evidence that the city manager signed a written contract with wrecker service, if the parties were contractually bound at all, it was pursuant to an oral contract; thus, plaintiff's attempt to bring an action five years later was barred by the applicable three-year statute of limitations. *Jenkins v. City of Little Rock*, 52 Ark. App. 113, 915 S.W.2d 298 (1996).

—Real Property Improvements.

Section 16-56-112(a) clearly establishes a maximum five-year period within which an injured party can bring suit against a person who deficiently constructs or repairs an improvement to real property which commences after the substantial completion of the improvement, but, in bringing such a suit, the injured party must still bring the action within the statute of limitations for that type of cause of action. If the breach or injury occurs immediately after the completion of the improvement, the injured party must still comply with subsection (3) and bring his action within three years from when the breach occurs but not later than the five-year period provided in § 16-56-112(a). *East Poinsett County Sch. Dist. No. 14 v. Union Std. Ins. Co.*, 304 Ark. 32, 800 S.W.2d 415 (1990).

The five-year limitations period contained in § 16-56-112(a) cannot be used to extend the three-year limitations period provided in subsection (3). *East Poinsett County Sch. Dist. No. 14 v. Union Std. Ins. Co.*, 304 Ark. 32, 800 S.W.2d 415 (1990).

—Third Party Beneficiaries.

Actions by third persons based on written contracts which are made for their benefit are governed by the limitation provided by § 16-56-111(a) rather than by this section. *H.B. Deal & Co. v. Bolding*, 225 Ark. 579, 283 S.W.2d 855 (1955).

Corporations.

Action under statute making officer of corporation liable for debts of corporation upon failure to file certificate required by statute is for a statutory liability and not a penalty, and this section and not § 16-56-108 governs. *Nebraska Nat'l Bank v. Walsh*, 68 Ark. 433, 59 S.W. 952 (1900). See also *McDonald v. Mueller*, 123 Ark. 226, 183 S.W. 751 (1916); *Hospelhorn v. Burke*, 196 Ark. 1028, 120 S.W.2d 705 (1938).

The statute of limitations runs against the president and secretary of a corporation who have failed to file the annual statement required by law as against the claim of a particular creditor from the time when a complete cause of action exists in favor of that creditor. *McDonald v. Mueller*, 123 Ark. 226, 183 S.W. 751 (1916).

An action in equity by the stockholders of a corporation, against the directors for misconduct, is based on implied liability; the suit is a derivative one which must be brought within the time in which the corporation itself should have brought the suit; the minority of a stockholder will not suspend the rule. *Magale v. Fomby*, 132 Ark. 289, 201 S.W. 278 (1918).

An action to enforce collection of a stockholder's statutory liability incurred by reason of an assessment duly made is not a suit to enforce a penalty but is an action founded on a contract not in writing enforceable within three years. *Vandover v. Lumber Underwriters*, 197 Ark. 718, 126 S.W.2d 105 (1939).

Claims based on alleged statutory liability of corporate directors were barred by this section. *Air Leases, Inc. v. Baker*, 167 F. Supp. 145 (W.D. Ark. 1958).

Statute of limitations was not tolled as

to Resolution Trust Corporation's claims against the officers or directors of a corporation as long as those officers and directors controlled the affairs of a corporation; Arkansas courts do not recognize the doctrine of adverse domination. *Resolution Trust Corp. v. Armbruster*, 52 F.3d 748 (8th Cir. 1995).

Counties.

A claim against a county for fees due an officer is a liability not in writing within the meaning of this section. *Baugh v. Prairie County*, 66 Ark. 360, 50 S.W. 876 (1899).

The statute of limitations runs in favor of counties against their ordinary indebtedness. *Boone County v. Skinner-Kennedy Stationery Co.*, 191 Ark. 329, 86 S.W.2d 18 (1935).

Action by individual taxpayer to recover amount of county funds allegedly unlawfully withdrawn by county judge was governed by three year limitation period, since action was based on an implied contract. *Ward v. Farrell*, 221 Ark. 363, 253 S.W.2d 353 (1952).

Debts.

Unwritten contracts, including those for the payment of borrowed money, may have a time for maturity depending on a future event, and this statute runs from the maturity thereof. *Smith v. Milam*, 195 Ark. 157, 110 S.W.2d 1062 (1937).

Complaint did not show on its face that debt was barred by limitation, and where defendant's evidence showed the debt became due less than three years from filing of suit, debt was not barred since cause of action on a debt does not accrue until after its maturity. *Smith v. Milam*, 195 Ark. 157, 110 S.W.2d 1062 (1937).

In suit on a note, maker's claim for credit for services in effecting sale of real estate for which payee agreed to credit money on the note was not barred by this statute, because pleaded as a setoff against the note, and, also, it was a closed transaction to which this section does not apply. *St. Louis Union Trust Co. v. Hammans*, 204 Ark. 298, 161 S.W.2d 950 (1942).

In order to continue or revive a cause of action or remove it from bar of statute of limitation there must be either an express promise of debtor to pay the debt or an acknowledgment of debt from which a

promise to pay is implied, or a conditional promise to pay the debt and evidence that the condition has been performed. *Blake v. Commercial Factors Corp.*, 216 Ark. 664, 226 S.W.2d 986 (1950).

In determining whether there has been a sufficient acknowledgment in writing to toll the statute of limitation, the question to be determined is the intention of the debtor. The writing must show that the claim is a subsisting debt and the presumption must be clear and certain. *Blake v. Commercial Factors Corp.*, 216 Ark. 664, 226 S.W.2d 986 (1950).

Where money was loaned on an oral agreement to repay and borrower endorsed and pledged an overdue note for a larger amount as security for the loan, endorsement of the note did not have the effect of reducing the loan to writing and the three year limitation of this section governed rather than the five year limitation of § 16-56-111(a). *Shelton v. Harris*, 225 Ark. 855, 286 S.W.2d 20 (1956).

Suit based on written support contract is a suit on a written instrument and is governed by the five year statute of limitations, and three year statute of limitations was not applicable. *Altman v. Altman*, 240 Ark. 370, 399 S.W.2d 501 (1966).

Payments on debt did not revive debts already barred by the three year statute of limitations where debtor was liable on another debt. *Camp v. Nokes*, 250 Ark. 819, 467 S.W.2d 730 (1971).

Three year statute of limitations on oral promise to pay commenced to run when promise was made, not when creditor paid a bank loan made to get money to loan debtor, although debtor promised to repay any interest creditor had to pay bank. *Camp v. Nokes*, 250 Ark. 819, 467 S.W.2d 730 (1971).

Oral agreement to assume and pay mortgage indebtedness was subject to three year statute of limitations. *Hyde Wholesale Dry Goods Co. v. Edwards*, 255 Ark. 211, 500 S.W.2d 85 (1973).

A debt otherwise barred by the statute of limitations can be revived by a letter in which the debtor unequivocally recognizes the indebtedness as a subsisting obligation and makes no statement repelling the presumption that he intends to pay; however, where the debtors' letter did not recognize the indebtedness as a subsisting obligation and fell far short of proving a

revival by acknowledgment, collection of the debt was barred by this section. *Wright v. Wright*, 279 Ark. 35, 648 S.W.2d 473 (1983).

—Accounts.

To constitute a payment on an account so as to bar the running of the statute, the money or other thing must pass from the debtor to the creditor for the purpose of extinguishing the debt and the creditor must receive it for the same purpose. *Pettus v. Rawls*, 131 Ark. 125, 198 S.W. 874 (1917).

In an action on a written contract witnessed by correspondence, the five year statute of limitations applies though an account is filed specifying the items on which the three year statute would have applied if the action had been brought on the account. *Sims v. Miller*, 151 Ark. 377, 236 S.W. 828 (1922).

An action on an oral guaranty of an open account is barred after three years from the date the last item was furnished. *Goldsmith v. First Nat'l Bank*, 169 Ark. 1162, 278 S.W. 22 (1925).

Refusal to instruct that items of debit and credit in an account, incurred more than three years prior to the suit, were barred was error where the accounts were not mutual, open and current. *St. Francis Valley Lumber Co. v. Orcutt*, 174 Ark. 282, 295 S.W. 713 (1927).

Letter written acknowledging debt on account was, in the absence of a plea of inability to pay or a showing that there was no time within three years from the time the letter was written when the account could have been paid, sufficient to toll the statute of limitations. *Arkansas R.R. v. New York Cent. R.R.*, 195 Ark. 304, 111 S.W.2d 457 (1937).

In an action to recover a balance on an open account, where defendant pleaded this statute, contending that payment upon which plaintiff relied to toll this statute had been made with instructions to apply it to a separate account, while plaintiff contended that it was all a continuing account, instructions properly submitted the issues of fact involved. *Thomason v. Wilcox*, 201 Ark. 867, 147 S.W.2d 725 (1941).

Letter of buyer regarding buyer's account established a new period from which statute of limitations began to run. *Blake v. Commercial Factors Corp.*, 216 Ark. 664, 226 S.W.2d 986 (1950).

Action on open account was not barred where summons was served less than three years after date of last payment on account. *Bridgman v. Drilling*, 218 Ark. 772, 238 S.W.2d 645 (1951).

Part payment upon an open account made after the bar of the statute has fallen is presumed to start the statute running anew in absence of circumstances indicating that the debtor did not thereby intend to recognize his obligation. *Taylor v. Slayton*, 231 Ark. 464, 330 S.W.2d 280 (1959).

Decedents' Estates.

The statute of limitations has no application to claims for expenses of administration where the administration is still pending. *Holland v. Doke*, 135 Ark. 372, 205 S.W. 648 (1918).

Claimant for services rendered to a decedent was not entitled to recover except for services rendered within three years immediately preceding the death of decedent. *Beauchamp v. Jernigan*, 189 Ark. 361, 72 S.W.2d 535 (1934); *Peoples Nat'l Bank v. Cohn*, 194 Ark. 1098, 110 S.W.2d 42 (1937); *Harris v. Whitworth*, 213 Ark. 480, 211 S.W.2d 101 (1948); *Trotter v. Kemp*, 232 Ark. 681, 340 S.W.2d 274 (1960).

Claim against a deceased's estate was barred by statute of limitation. *Johnson v. Murphy*, 204 Ark. 980, 166 S.W.2d 9 (1942).

Where a claim against a deceased's estate is barred by the statute of limitation unless certain payments had been made, the mere fact that the payments were entered on the account and appear as credits, is insufficient to prove that those payments were in fact made. *Johnson v. Murphy*, 204 Ark. 980, 166 S.W.2d 9 (1942).

Court held that none of the indebtedness of decedent to landlord was barred by the statute of limitations where the limitation had not run before decedent's death. *Goins v. Sneed*, 229 Ark. 550, 317 S.W.2d 269 (1958).

This section does not apply to actions against a decedent's estate, but those actions must be brought within the time limit for filing claims against the estate even though the plaintiff is looking not to the assets of the estate but to the decedent's liability insurer for payment of his judgment. *Swan v. Estate of Monette ex*

rel. Monette, 265 F. Supp. 362 (W.D. Ark.), aff'd, 400 F.2d 274 (8th Cir. 1968).

Action for breach of fiduciary duty was timely where it was instituted within three years of the first action adverse to the estate. *Jamison v. Estate of Goodlett*, 56 Ark. App. 71, 938 S.W.2d 865 (1997).

Employment Contracts.

Suit by employee for wrongful discharge based on violation of written collective bargaining contract was barred by three year limitation period for suits on oral contract where contract of employment with railroad was oral. *Roberts v. Thompson*, 107 F. Supp. 775 (E.D. Ark. 1952).

Suit for wrongful discharge based on violation of written collective bargaining contract and written job application where contract of employment was oral would be barred by three year limitation period for oral contracts in this section, but filing of suit within three years after discharge with employee taking a nonsuit after the three years and bringing another action under § 16-56-126 was not barred. *Smithey v. St. Louis S.W. Ry.*, 127 F. Supp. 210 (E.D. Ark. 1955).

Complaint against employed defendant which was filed more three years after termination of the defendant's employment was not timely filed. *Tasby v. Peek*, 396 F. Supp. 952 (W.D. Ark. 1975).

Claim that publication of false and defamatory statements by defendants was a wrongful interference with plaintiff's employment contract and future economic and business expectancies sounds in tort and thus must be brought within three years or it is barred. *Bankston v. Davis*, 262 Ark. 635, 559 S.W.2d 714 (1978).

Federal Preemption.

When a nonsuit is taken in a federal court and a new suit is begun in a state court within a year as provided in § 16-56-126, the new action is maintainable although begun more than three years after the cause accrued, as the pendency of the suit in the federal court for the same cause of action had the effect to toll the general statute. *Kansas City S. Ry. v. Akin*, 138 Ark. 10, 210 S.W. 350 (1919).

Where federal statute suspended the running of any existing statute of limitations applicable to violations of antitrust laws of the United States or subject to civil proceedings under any existing stat-

ute, act of suspension applied equally to private and government actions; Arkansas three year statute of limitations did not bar suit for treble damages brought by company under provisions of Robinson-Patman Price Discrimination Act. *Russellville Canning Co. v. American Can Co.*, 87 F. Supp. 484 (W.D. Ark. 1949).

Federal statute of limitations rather than this section applies to an action by a trustee in bankruptcy to set aside preferential payment by the bankrupt. *Nicklaus v. McClure*, 244 Ark. 23, 423 S.W.2d 562 (1968).

The limitation period for actions brought under the provisions of the Federal Securities Exchange Act of 1934 or the Securities Act of 1933 is that prescribed in § 23-42-106(f) and not that prescribed by this section. *Vanderboom v. Sexton*, 422 F.2d 1233 (8th Cir. 1970), rev'g, 294 F. Supp. 1178 (W.D. Ark. 1969), cert. denied, 400 U.S. 852, 91 S. Ct. 47, 27 L. Ed. 2d 90 (1970).

The three year limitation of this section was applicable to an action for common law fraud but not to an action for violation of § 10 of the Federal Securities Exchange Act of 1934. *Vanderboom v. Sexton*, 422 F.2d 1233 (8th Cir. 1970), cert. denied, 400 U.S. 852, 91 S. Ct. 47, 27 L. Ed. 2d 90 (1970).

Fraud and Deceit.

Where a suit is barred unless brought within three years after the cause of action accrues, yet there has been a fraudulent concealment of the cause of action, the statute is suspended until discovery of the fraud. *Free v. Jordan*, 178 Ark. 168, 10 S.W.2d 19 (1928).

An action for fraud and deceit is a tort and barred by the three year limitation. *Air Leases, Inc. v. Baker*, 167 F. Supp. 145 (W.D. Ark. 1958).

Plaintiff could not be heard to claim fraud or concealment as a bar to the statute based on an allegation in the complaint when the defendant had offered substantive proof that there was no fraud or concealment. *Mining Corp. of Arkansas v. International Paper Co.*, 324 F. Supp. 705 (W.D. Ark. 1971).

Where the gravamen of plaintiff's complaint for damages was that the defendant fraudulently concealed the illegal nature of a loan transaction so that plaintiff would be convicted of making illegal

loans, the action was subject to the three year statute of limitations for actions founded on any contract or liability, express or implied. *Lane v. Graves*, 525 F.2d 311 (8th Cir. 1975).

Although similar to an action for defamation, an action for deceit is distinct and is covered by a different, three year statute of limitations. *Bishop v. Tice*, 622 F.2d 349 (8th Cir. 1980).

In fraud actions, for purposes of determining when the statute of limitations begins to run, parties alleging fraud are charged with knowledge of any pertinent real estate conveyances from the time the conveyances are placed in public records, since filing for public record and concealment are mutually exclusive. *Hughes v. McCann*, 13 Ark. App. 28, 678 S.W.2d 784 (1984).

Affirmative action on the part of the person charged with fraud to conceal a plaintiff's cause of action will toll the running of the statute of limitations. *Hughes v. McCann*, 13 Ark. App. 28, 678 S.W.2d 784 (1984); *Williams v. Hartje*, 827 F.2d 1203 (8th Cir. 1987).

Fraud suspends the running of the statute of limitations, and the suspension remains in effect until the party having the cause of action discovers the fraud or should have discovered it by the exercise of reasonable diligence. *Hughes v. McCann*, 13 Ark. App. 28, 678 S.W.2d 784 (1984); *Talbot v. Jansen*, 294 Ark. 537, 744 S.W.2d 723 (1988); *Hickson v. Saig*, 309 Ark. 231, 828 S.W.2d 840 (1992); *First Pyramid Life Ins. Co. of Am. v. Stoltz*, 311 Ark. 313, 843 S.W.2d 842 (1992), cert. denied, 510 U.S. 908, 114 S. Ct. 290, 126 L. Ed. 2d 239 (1993).

The plaintiff's claim for misrepresentation arising from the alleged promise to give her a teacher's contract was time barred, where the latest possible date of any such promise would have been more than three years before the filing of the complaint. *Crutchfield v. Pulaski County Special Sch. Dist.*, 647 F. Supp. 884 (E.D. Ark. 1986).

Where existence of cause of action has been fraudulently concealed, the statute of limitations begins to run no later than the day that the concealed matter was discovered; but concealment of facts, no matter how fraudulent or otherwise wrongful, has no effect on the running of a statute of limitations if the plaintiffs could

have discovered the fraud or sufficient other facts on which to bring their lawsuit, through a reasonable effort on their part. *Williams v. Hartje*, 827 F.2d 1203 (8th Cir. 1987).

Fraud claim held barred. *Moore v. Moore*, 21 Ark. App. 165, 731 S.W.2d 215 (1987).

A cause of action for fraud is governed by this section. *Ripplemeyer v. National Grape Coop. Ass'n*, 807 F. Supp. 1439 (W.D. Ark. 1992).

The burden is on the plaintiff to exercise due diligence to discover the fraud if apprised of facts which should place the plaintiff on notice. *Ripplemeyer v. National Grape Coop. Ass'n*, 807 F. Supp. 1439 (W.D. Ark. 1992).

The statute of limitations on fraud is three years. *Wages v. Robson*, 148 Bankr. 567 (Bankr. E.D. Ark. 1992).

There was no evidence of record that insurance company attempted to fraudulently conceal, cover-up, or misrepresent to an estate the problem of determining the proper beneficiary of an insurance policy. *First Pyramid Life Ins. Co. of Am. v. Stoltz*, 311 Ark. 313, 843 S.W.2d 842 (1992), cert. denied, 510 U.S. 908, 114 S. Ct. 290, 126 L. Ed. 2d 239 (1993).

Under Arkansas law, a cause of action for fraud is governed by a three-year statute of limitations. *Jackson v. Swift-Eckrich*, 830 F. Supp. 486 (W.D. Ark. 1993), aff'd sub nom. *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995).

While an action for fraud must be brought within three years from the date the cause of action accrues, the fraud does suspend the running of the statute of limitations and the suspension remains in effect until the party having the cause of action discovered the fraud or should have discovered it by the exercise of reasonable diligence. *Jackson v. Swift-Eckrich*, 830 F. Supp. 486 (W.D. Ark. 1993), aff'd sub nom. *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995).

The plaintiff's misrepresentation and/or constructive fraud claims were time barred where, by their own admission, plaintiffs knew the contract terms were being changed by defendant to their detriment more than three years prior to the filing of the suit. *Jackson v. Swift-Eckrich*, 830 F. Supp. 486 (W.D. Ark. 1993), aff'd sub nom. *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995).

In an action for fraud or misrepresentation the statutory limitation period begins to run when the wrong occurs, not when it is discovered; in the absence of purposeful concealment of the wrong, the statute of limitations is not tolled. *Hampton v. Taylor*, 318 Ark. 771, 887 S.W.2d 535 (1994).

Where the dates on which defendant's alleged misrepresentations were made were one month apart, the latter date was controlling for purposes of the running of the statute of limitations. *Hampton v. Taylor*, 318 Ark. 771, 887 S.W.2d 535 (1994).

Where defendant did nothing to prevent plaintiff from discovering the falsity of his reputed representation that touching her breasts was necessary to a lymph node examination, plaintiff failed to show an affirmative act of concealment, and her cause of action advanced under either a medical injury or invasion of privacy theory accrued on her last treatment date. *Norris v. Bakker*, 320 Ark. 629, 899 S.W.2d 70 (1995).

Farmer's action for fraud against a corporation was not barred by the statute of limitations because it was filed within three years of the last time the corporation made a fraudulent misrepresentation to the farmer. *Tyson Foods, Inc. v. Davis*, 347 Ark. 566, 66 S.W.3d 568 (2002).

Goods and Chattel.

The statute of limitations does not run against the plaintiff in a replevin suit if he was a minor at the time of the commencement of the suit. *Phipps v. Martin*, 33 Ark. 207 (1878).

The statute does not begin to run against an action for the recovery of property fraudulently concealed until the fraud is discovered. *Conditt v. Holden*, 92 Ark. 618, 123 S.W. 765 (1909).

A bill of lading for shipping is a contract in writing, and where a carrier sues the shipper for a balance due under it, the five year statute of limitations applies. *Missouri Pac. R.R. v. Pfeiffer Stone Co.*, 166 Ark. 226, 266 S.W. 82 (1924).

Where goods were taken upon arrival by company other than consignee and warehouse receipts were delivered to unauthorized person, there was a conversion, and action by shipper after more than three years from the taking of the goods and the delivery of the warehouse receipts was barred by this statute.

Meacham v. Mid-South Cotton Grower's Ass'n, 196 Ark. 78, 115 S.W.2d 1078 (1938).

Statute of limitations begins to run in favor of person charged with converting chattels at the time when the conversion takes place. *Thomas v. Westbrook*, 206 Ark. 841, 177 S.W.2d 931 (1944).

Action by assignee of note secured by chattel mortgage against maker of the note and third party who had converted the chattels was not a suit on a note nor a suit to foreclose a mortgage, but a suit for conversion subject to the limitation provided by this statute rather than the five year statute of limitations. *Thomas v. Westbrook*, 206 Ark. 841, 177 S.W.2d 931 (1944).

Where a producer wrongfully sold equities of redemption in warehouse receipts to two purchasers, and the second purchaser buys in good faith without notice of prior sale and redeems the receipt before the first purchaser demands the receipts, an action brought four years after notice of purchaser's redemption was barred by the statute of limitations. *Scroggin Farms Corp. v. McFadden*, 165 F.2d 10 (8th Cir. 1948).

Suit by assignee of stored goods to recover for cotton taken by subsequent assignee of original assignor was a suit for conversion and not for violation of contract, and therefore this section and not § 16-56-111(a) applies. *Scroggin Farms Corp. v. Howell*, 216 Ark. 569, 226 S.W.2d 562 (1950).

—Bailments.

Statute does not run against a bailee until he does some act inconsistent with the relation. *Chapman v. Hudson*, 46 Ark. 489 (1885).

In bailments, an action for the property does not accrue nor the statute of limitations begin to run until demand is made therefor and delivery is refused. *Lee County Nat'l Bank v. Hughes*, 165 Ark. 493, 265 S.W. 50 (1924).

Where relationship of bailor and bailee existed between shipper and warehouse company, delivery of warehouse receipts to unauthorized person would be a severance of that relationship, and statute of limitations against shipper's cause of action would begin to run as of the date the receipts were delivered. *Meacham v. Mid-South Cotton Growers Ass'n*, 196 Ark. 78, 115 S.W.2d 1078 (1938).

Where there has been a loan of a chattel for an indefinite period, the statute of limitations does not run against the bailor until a repudiation of his title is brought home to him. *Shewmake v. Shifflett*, 205 Ark. 875, 171 S.W.2d 309 (1943).

—Conversion.

The statute of limitations for conversion of personal property and the running of time for adverse possession are the same. *Johnson v. Gilliland*, 320 Ark. 1, 896 S.W.2d 856 (1995).

Implied Liability.

Implied obligations arising from mere acceptance of a deed are controlled by this section. *Dismukes v. Halpern*, 47 Ark. 317, 1 S.W. 554 (1886); *Matthews v. Simmons*, 49 Ark. 468, 5 S.W. 797 (1887). See also *Percy v. Cockrill*, 53 F. 872 (8th Cir. 1893).

A right of action by a joint maker of a note who paid it for contribution is based on an implied obligation and is barred in three years from the time payment was made. *Hazel v. Sharum*, 182 Ark. 557, 32 S.W.2d 315 (1930).

In action for breach of implied warranty in sale of goods, statute of limitation begin to run from the date of sale and delivery of goods. *Peterson v. Brown*, 216 Ark. 709, 227 S.W.2d 142 (1950).

Where owner of cafe shot and injured customer, cause of action of customer was governed by three year limitation of this section as founded on an implied liability growing out of the proprietor-invitee relationship rather than the one year limitation of § 16-56-104 governing assault and battery. *Jefferson v. Nero*, 225 Ark. 302, 280 S.W.2d 884 (1955).

Action fell within the implied obligation or liability provisions of this section. *Carroll County v. Eureka Springs Sch. Dist.* # 21, 292 Ark. 151, 729 S.W.2d 1 (1987).

Insurance.

Where no time limit for making proof of disability is contained in insurance policy, proof of disability may be made at any time within this statute. *National Reserve Life Ins. Co. v. Cook*, 194 Ark. 433, 108 S.W.2d 471 (1937).

As to all invalid warrants shown by any settlement to have been paid more than three years prior to the date suit was filed to recover the same, the cause of action was barred. *Fidelity & Cas. Co. v. State*, 197 Ark. 1027, 126 S.W.2d 293 (1939).

Limitations against action by excess liability insurance carrier against primary insurer did not begin to run until settlement payment was made. *Trinity Universal Ins. Co. v. State Farm Mut. Auto Ins. Co.*, 246 Ark. 1021, 441 S.W.2d 95 (1969).

Where the insurance carrier paid the insured for losses, in a damage suit filed by the insured the insurance carrier could not be substituted as plaintiff more than three years after the insurance claim was paid and after the three year statute of limitations had run. *Ark-Homa Foods, Inc. v. Ward*, 251 Ark. 662, 473 S.W.2d 910 (1971).

The theory of subrogation being that the subrogee steps into the shoes of subrogor, he takes subject to all defenses which the third party could have asserted against the subrogor, including the statute of limitations. *Williams v. Globe Indem. Co.*, 507 F.2d 837 (8th Cir. 1974), cert. denied, 421 U.S. 948, 95 S. Ct. 1679, 44 L. Ed. 2d 101 (1975).

The equitable duty to reimburse, when an insured settles with a tortfeasor and thereby destroys the insurer's subrogation interest, is a liability implied by law with a three year limitations period. *Provident Life & Accident Ins. Co. v. Williams*, 858 F. Supp. 907 (W.D. Ark. 1994).

Insured's bad faith and negligence claims against insurer accrued when judgment was entered against her in the underlying state court action. *Carpenter v. Automobile Club Interinsurance Exch.*, 58 F.3d 1296 (8th Cir. 1995).

The statute of limitations for an insurance agent's negligence commences at the time the negligent act occurs. *Calcagno v. Shelter Mut. Ins. Co.*, 55 Ark. App. 321, 934 S.W.2d 548 (1996), aff'd, 330 Ark. 802, 957 S.W.2d 700 (1997).

In actions based on negligence, a subrogee insurance company is subject to the same three-year statute of limitations period as its insured. *Shelter Ins. Co. v. Arnold*, 57 Ark. App. 8, 940 S.W.2d 505 (1997).

Knowledge.

Ignorance of the existence of a cause of action does not suspend the running of the statute of limitations in absence of fraudulent concealment by the defendant. *Morrilton Homes, Inc. v. Sewer Imp. Dist. No. 4*, 226 Ark. 22, 287 S.W.2d 581 (1956); *Cherepski v. Walker*, 323 Ark. 43, 913 S.W.2d 761 (1996).

Where the appellees admitted they attempted to complete the novation of contracts as secretly as possible, the statute did not begin to run until the appellants had or, by the exercise of due diligence, should have known, the facts that gave rise to their cause of action. *Klein v. Jones*, 980 F.2d 521 (8th Cir. 1992), cert. denied, 519 U.S. 815, 519 U.S. 816, 117 S. Ct. 65, 136 L. Ed. 2d 27 (1996).

Libel.

Under this section an action alleging libel under Arkansas law must be brought within three years after the cause of action accrued. *Gilpin v. Tack*, 256 F. Supp. 562 (W.D. Ark. 1966).

Malpractice.

In accountant malpractice cases, the statute of limitations begins to run, in the absence of concealment of the wrong, when the negligence occurs, not when it is discovered. *Ford's Inc. v. Russell Brown & Co.*, 299 Ark. 426, 773 S.W.2d 90 (1989).

The limitations period for professional negligence is three years, and it begins to run at the time the tortious conduct is committed. *FDIC v. Deloitte & Touche*, 834 F. Supp. 1129 (E.D. Ark. 1992).

Three years is the applicable statute of limitations for breach of fiduciary duty and malpractice actions. *Smith v. Elder*, 312 Ark. 384, 849 S.W.2d 513 (1993).

Although the trial court determined that the five year statute of limitations applicable to written contracts applied, where the trial court based its finding of liability against the defendant completely upon the finding that defendant breached his fiduciary duty to plaintiffs as their attorney and thereby committed malpractice, the applicable statute of limitations as to defendant was three years. *Smith v. Elder*, 312 Ark. 384, 849 S.W.2d 513 (1993).

The statute of limitations in legal malpractice cases begins to run, in the absence of concealment of the wrong, when the act of negligence occurs, not when it is discovered. *Morris v. McLemore*, 313 Ark. 53, 852 S.W.2d 135 (1993).

The three-year limitation period was tolled during the time the trial court's ruling was in effect until the court of appeals' decision reversing the trial court's ruling was delivered. *Pope County v. Friday, Eldredge & Clark*, 313 Ark. 83, 852 S.W.2d 114 (1993).

The limitation period begins to run in malpractice cases upon the occurrence of the last element essential to the cause of action. *Wright v. Compton, Prewett, Thomas & Hickey*, 315 Ark. 213, 866 S.W.2d 387 (1993).

The statute of limitations for an insurance agent commences at the time the negligent act occurs, in keeping with the traditional rule in professional malpractice cases. *Flemens v. Harris*, 323 Ark. 421, 915 S.W.2d 685 (1996).

Statute of limitations applied to an action against a law firm handling the probate of an estate despite the fact that the firm signed a tolling agreement. *Stoltz v. Friday*, 325 Ark. 399, 926 S.W.2d 438 (1996).

This section applies to actions against an attorney for negligence; the period begins to run, in the absence of concealment of the wrong, when the negligence occurs, not when the negligence is discovered. *Smothers v. Clouette*, 326 Ark. 1017, 934 S.W.2d 923 (1996).

Arkansas has long adhered to the traditional occurrence rule in legal malpractice; thus, where plaintiff did not allege that her attorneys concealed their alleged wrongdoing, and she was not prevented from bringing suit, the trial court's finding that her case was barred by the three-year statute of limitations and the grant of summary judgment was correct. *Ragar v. Brown*, 332 Ark. 214, 964 S.W.2d 372 (1998).

Miscellaneous.

When the right to a public office is contested, the right to receive the emoluments of the office depends upon an adjudication of the title which is made in the contest suit and until the title to the office is adjudicated, the right of action to recover emoluments is not mature, and a suit to collect the emoluments is not barred by limitations when brought within three years of the final adjudication of the title to the office. *Bowen v. Lovewell*, 119 Ark. 64, 177 S.W. 929 (1915).

The three year statute of limitations controls in an action by a surety to compel contribution by a cosurety. *Cooper v. Rush*, 138 Ark. 602, 212 S.W. 94 (1919); *Pennington v. Karcher*, 171 Ark. 828, 286 S.W. 969 (1926).

A suit on a highway contractor's bond to

pay subcontractor may be maintained at any time within three years after the completion of the work where the subcontract was not in writing. *Tolbert Bros. & Co. v. Molinder*, 178 Ark. 888, 12 S.W.2d 780 (1929).

Person holding and having physical possession of bank stock endorsed in blank by the person to whom issued acquired title by adverse possession three years after the person had notice of the adverse claim to title and title in the adverse possession 18 years later related back to the beginning of the three-year period, and dividends all belonged to the adverse possessor. *Henderson v. First Nat'l Bank*, 254 Ark. 427, 494 S.W.2d 452 (1973).

Plaintiff's claims were time-barred because his complaint was filed on the first day of the fourth year after the alleged wrongful release of plaintiff's records. *Morton v. City of Little Rock*, 934 F.2d 180 (8th Cir. 1991).

Pleadings.

It was held that, three years having elapsed between the time the plaintiff's cause of action accrued and the time the complaint was amended to make the defendant a party, the action against him was barred. *Tedford Auto Co. v. Chicago, R.I. & P. Ry.*, 116 Ark. 198, 172 S.W. 1006 (1915).

In an action by a company, a counterclaim was not barred because the cause of action thereon arose over three years before the complaint was filed if it was not barred when the plaintiff's cause of action accrued. *Missouri & N.A. Ry. v. Bridwell*, 178 Ark. 37, 9 S.W.2d 781 (1928).

In an action for assault, a cause of action for slander which was barred by statute before the assault could not be interposed as a counterclaim. *Collier v. Thompson*, 180 Ark. 695, 22 S.W.2d 562 (1929).

An amendment to a complaint filed after the statute had run was allowed where the effect of the amendment was only to correct the name of the party originally sued. *Evans v. List*, 193 Ark. 13, 97 S.W.2d 73 (1936).

Where original complaint on open account was not barred, neither was the complaint's amendment filed more than three years after date of last payment on account, where amendment merely amplified and expanded single cause of action

stated in original complaint. *Bridgman v. Drilling*, 218 Ark. 772, 238 S.W.2d 645 (1951).

The defense of limitations may be raised by motion to dismiss. *Adams v. Greer*, 114 F. Supp. 770 (W.D. Ark. 1953).

Where statute of limitations was not pleaded it could not be relied upon even though the face of the record indicated it might have been a good defense if pleaded. *Ashley v. Eisele*, 247 Ark. 281, 445 S.W.2d 76 (1969).

Where statute of limitations was pleaded and relied on by plaintiff, defendant had the right to plead and rely on any facts and circumstances which may have tolled the statute. *Ashley v. Eisele*, 247 Ark. 281, 445 S.W.2d 76 (1969).

Where the first counterclaim amended did not allege the cause of action for fraud and deceit but the later amendment at the end of the three year period stated that cause of action, the relief sought for the action was barred. *Beam v. Monsanto Co.*, 259 Ark. 253, 532 S.W.2d 175 (1976).

Property Damage.

Damages arising under a contract to permit the defendant to use the plaintiff's wall in the construction of a building are original and begin to run when the building is negligently constructed and attached to the wall, and an action for damages for the negligent construction is barred after three years. *Evans v. Pettus*, 112 Ark. 572, 166 S.W. 955 (1914).

The fact that the sewers are of permanent construction does not render the nuisance permanent; when a sewer system was constructed and maintained so as to constitute a nuisance, the nuisance is of a continuing or recurring nature, and an action by plaintiffs on account of the nuisance is not barred by the three year statute. *Jones v. Sewer Imp. Dist. No. 3*, 119 Ark. 166, 177 S.W. 888 (1915).

In an action against a railroad for damages to a dwelling from maintenance of a coal chute, the limitation began to run upon the completion of the chute. *Missouri Pac. Ry. v. Davis*, 186 Ark. 401, 53 S.W.2d 851 (1932); *Baldwin v. Simpson*, 191 Ark. 448, 86 S.W.2d 420 (1935).

Where a structure alleged to have caused diversion of water was erected more than three years before the suit was filed, the permanency of the structure is not wholly controlling. If it is of such a

character that damage must necessarily result but the nature and extent of the damage may not be reasonably ascertained at the time of construction, then the damage is not original and the statute of limitations is not set in motion until the injury occurs. *St. Louis & S.F. Ry. v. Spradley*, 199 Ark. 174, 133 S.W.2d 5 (1939).

Suit for injury to property brought within three years after plaintiff reached age of majority was not barred under this statute where plaintiff had a homestead interest in addition to a fee estate in the property. *Andrews v. Johnson*, 202 Ark. 1115, 155 S.W.2d 681 (1941).

Statute of limitations from damage caused by dam or floodgate runs from when damage actually occurs. *Greasy Slough Outing Club, Inc. v. Amick*, 224 Ark. 330, 274 S.W.2d 63 (1954); *Naylor v. Eagle*, 227 Ark. 1012, 303 S.W.2d 239 (1957).

In action for damages for maintenance of a nuisance, the statute of limitations begins to run from the happening of the injury complained of. *Consolidated Chem. Indus., Inc. v. White*, 227 Ark. 177, 297 S.W.2d 101 (1957).

The statute of limitations began to run against an action when the damage to the land became permanent, and it was a question of fact for the jury when the damage became permanent. *Sunray DX Oil Co. v. Thurman*, 238 Ark. 789, 384 S.W.2d 482 (1964); *Springdale v. Weathers*, 241 Ark. 772, 410 S.W.2d 754 (1967).

Where gasoline retailer, having been sued for contamination of neighboring property, discovered the source of the contamination was from another gasoline retailer, the discovery rule was appropriately applied to the limitations statute, subdivision (4), applicable to the first retailer's claim against the second retailer. *State v. Diamond Lakes Oil Co.*, 347 Ark. 618, 66 S.W.3d 613 (2002).

—Ditches, Embankments, Etc.

This section applies to suits against railroads for building levees causing an overflow of the plaintiff's land. *St. Louis, I.M. & S. Ry. v. Morris*, 35 Ark. 622 (1880); *Fordyce v. Stone*, 50 Ark. 250, 7 S.W. 129 (1887); *Saint Louis, I.M. & S. Ry. v. Biggs*, 52 Ark. 240, 12 S.W. 331, 6 L.R.A. 804 (1889); *Saint Louis, I.M. & S. Ry. v. Yarrowborough*, 56 Ark. 612, 20 S.W. 515 (1892).

A suit for damages for obstructing ditches is barred after three years. *Saint Louis, I.M. & S. Ry. v. Anderson*, 62 Ark. 360, 35 S.W. 791 (1896).

Where the obstruction of a stream by reason of the construction of an embankment and ditch was of a permanent nature and necessarily injurious to the land of the adjacent proprietors, the damages thereby caused can be recovered only by suit brought within three years from the time the embankment and ditch were completed. *Saint Louis, I.M. & S. Ry. v. Magness*, 93 Ark. 46, 123 S.W. 786 (1909).

Where a company constructs a culvert so that damage to adjoining property by overflow must necessarily result and the certainty, nature, and extent of the damage may be reasonably ascertained and estimated at the time of the construction of the culvert, then the damage is original and there can be but a single recovery, and the statute of limitations against the cause of action is set in motion on the completion of the obstructing culvert. *Chicago, R.I. & Pac. Ry. v. Humphreys*, 107 Ark. 330, 155 S.W. 127 (1913).

Where a levee permanently obstructed the drainage of land and caused the same to overflow, and the owner of the land had knowledge of the condition, the damage was original and the cause of action therefor arose immediately upon the completion of the levee. *Russell v. Board of Dirs.*, 110 Ark. 20, 160 S.W. 865 (1913).

Suit to enjoin obstruction and diversion of the natural flow of a creek by filling in a trestle spanning it and digging a ditch too small to accommodate the flow during heavy rains, thus causing the water to back up over the plaintiff's lands, is barred after three years from the completion of the embankment, the nuisance as well as the injuries being original and permanent. *Boas v. Missouri Pac. Ry.*, 157 Ark. 446, 248 S.W. 283 (1923).

In a cause of action for overflow of subjacent land, where water broke through defendant's embankment and flooded the plaintiff's land, the statute began to run from the time the injury occurred. *Baldwin v. Neal*, 190 Ark. 673, 80 S.W.2d 648 (1935).

Where the defendant, in the exercise of the right of eminent domain, dug ditches across plaintiff's land through which polluted water flowed, it was a taking of land to the extent of a diminution thereof on

value for which plaintiff was entitled to compensation; but an action to recover damages therefor must be brought within three years of the date of the exercise of the right of eminent domain. *Sewer Imp. Dist. No. 1 v. Jones*, 199 Ark. 534, 134 S.W.2d 551 (1939).

Action instituted for damage allegedly caused by water overflowing plaintiff's land by reason of failure to keep ditches, culverts and drain pipes under roadbed open in two prior years was not barred by this statute, though ditches were constructed more than three years before, since damages were of a recurring nature. *Missouri Pac. R.R. v. Holman*, 204 Ark. 11, 160 S.W.2d 499 (1942).

Where ditch which encroached on plaintiff's land was dug five years before the suit was instituted and it was apparent at the time it was dug that the water flowing through it would widen it by erosion, the injury to the plaintiff's land was certain and permanent and the action was barred by the statute of limitations. *Cox v. Berry*, 233 Ark. 910, 349 S.W.2d 661 (1961).

—Dumps.

Action for damages resulting from maintenance of dump was held barred by the three year statute. *Davis v. Dunn*, 157 Ark. 125, 247 S.W. 793 (1923).

Evidence sufficient to find that damages to plaintiff's land from dump occurred within three years before the filing of the complaint. *Consolidated Chem. Indus., Inc. v. White*, 227 Ark. 177, 297 S.W.2d 101 (1957).

Limitation of claims for damages resulting from dump to the three years prior to the suit was proper. *Moore v. City of Blytheville*, 1 Ark. App. 35, 612 S.W.2d 327 (1981).

—Power Plants.

Where the defendant's power plant threw soot, cinders, and ashes on the plaintiff's property inflicting damages which could have been estimated and compensated at the time the injury first occurred, there was an original and permanent injury so that the statute of limitations began to run at once. *Brown v. Arkansas Cent. Power Co.*, 174 Ark. 177, 294 S.W. 709 (1927).

Where a power plant in its operation is such that damages must necessarily result and the certainty, nature, and extent

of the damage can then be reasonably ascertained and estimated, the statute of limitations begins to run at the time of the construction. *Brown v. Arkansas Cent. Power Co.*, 174 Ark. 177, 294 S.W. 709 (1927).

—Removals from Land.

An action for taking gravel from land is barred after three years. *Arkansas Power & Light Co. v. Decker*, 181 Ark. 1079, 28 S.W.2d 701 (1930).

A cause of action for removal of support to the surface arose when the subsidence occurred and the plaintiffs could bring their action for injuries within the statutory period after injuries to the surface occurred, irrespective of the date of the removal of support. *Western Coal & Mining Co. v. Randolph*, 191 Ark. 1115, 89 S.W.2d 741 (1936).

Real Estate Interests.

The right to enforce the collection of the amount bid at a sale of real estate sold in the pursuance of a decree of foreclosure, where the sale to the bidder is not confirmed by the court, is barred by the three year statute of limitations. *Cotham v. Lucy*, 115 Ark. 84, 171 S.W. 113 (1914).

Statute does not apply where plaintiff claims title to the land. *Sutton v. Lee*, 181 Ark. 914, 28 S.W.2d 697 (1930).

Statute limiting time for bringing an action against purchaser of land sold on judicial sale does not apply against a person in possession of property in dispute. *Forbus v. Gibbs*, 216 Ark. 138, 224 S.W.2d 790 (1949).

Where plaintiff, formerly under guardianship, brought an action to reform tax deeds issued to wife during guardianship and alleged that wife and stepdaughter used funds of the guardianship to purchase deeds, plaintiff was estopped to assert three year statute of limitation barring right of stepdaughter to refund, where evidence showed that action for refund had been delayed due to promise of plaintiff to will her the property. *Forbus v. Gibbs*, 216 Ark. 138, 224 S.W.2d 790 (1949).

When action to divest person of any title and claim to land in question was brought within three years after that person asserted claim of title, the action was within the statute of limitation on actions in contract not reduced to writing. *Fuller v.*

Fuller, 240 Ark. 475, 400 S.W.2d 283 (1966).

Where there is no written contract for the sale of land, a cause of action for breach of the contract, if oral, was barred after three years. *Booth v. Mason*, 241 Ark. 144, 406 S.W.2d 715 (1966).

An action brought to enforce a trust alleged to have been created sixteen years earlier by a father's conveyance of real estate to one of his sons which was repudiated by the widow of the grantee six years prior to the bringing of the action was barred by this section. *White v. McBride*, 245 Ark. 594, 434 S.W.2d 79 (1968).

—Abstractors.

The right of action against an abstractor for damages resulting from errors, defects, or omissions in an abstract of title prepared by him is not and cannot be based on the written certificate attached to the abstract because the written certificate is only evidence of the provisions of the preexisting oral or implied contract of employment. *Adams v. Greer*, 114 F. Supp. 770 (W.D. Ark. 1953).

The right of action against an abstractor for damages resulting from errors, defects, or omissions in an abstract of title prepared by him accrues at the time of the delivery of the abstract. *Adams v. Greer*, 114 F. Supp. 770 (W.D. Ark. 1953).

The statute of limitations in an action brought against an abstractor for damages resulting from an omission in the abstract of title, in the absence of concealment of the wrong, begins to run when the negligence occurs, not when it is discovered. *Riggs v. Thomas*, 283 Ark. 148, 671 S.W.2d 756 (1984).

Recovery of Money.

An action to recover money paid by mistake is barred in three years. *Richardson v. Bales*, 66 Ark. 452, 51 S.W. 321 (1899).

An action to recover a bank deposit is barred after three years. *England v. Hughes*, 141 Ark. 235, 217 S.W. 13 (1919).

An action to recover money, paid out under a void contract, which had been wrongfully converted sounded purely in tort and was not within this section but was governed by § 16-56-115. *Core v. McWilliams Co.*, 175 Ark. 112, 298 S.W. 879 (1927).

This section is applicable to a claim of a county board of education for excess commissions and interest belonging to the common school fund and improperly credited to the county general fund. *County Bd. of Educ. v. Morgan*, 182 Ark. 1110, 34 S.W.2d 1063 (1931), overruled on other grounds, *Hartwick v. Thorne*, 300 Ark. 502, 780 S.W.2d 531 (1989).

The three year and not five year statute of limitations was applicable to suit to recover from circuit clerk excess fees and commissions above the lawful salary allowed where there was no intentional fraud, corruption, or willful diversion on the part of the clerk. *State ex rel. Garland County v. Jones*, 198 Ark. 756, 131 S.W.2d 612 (1939).

Action to recover from fees alleged to have been wrongfully received by sheriff of the county was, since the fees were collected more than three years before the action was instituted, barred by the three year statute. *Baker v. Allen*, 204 Ark. 818, 164 S.W.2d 1004 (1942).

Where a sheriff uses his office to wrongfully obtain money from person and where suit is brought to recover the money, it is an action to recover money wrongfully obtained, and after three years the statute of limitations would bar a recovery. *Wrinkles v. Brown*, 217 Ark. 393, 230 S.W.2d 39 (1950).

Where commissioners of sewer improvement district did not learn of sewer connections until three years after they were made, suit filed more than three years after the connection was made to recover connection charges was barred by the limitation of this section. *Morrilton Homes, Inc. v. Sewer Imp. Dist. No. 4*, 226 Ark. 22, 287 S.W.2d 581 (1956).

An action by taxpayers to compel a county judge to reimburse the county for use of county labor and equipment on private property for private benefit was governed by this section. *McGhee v. Glenn*, 244 Ark. 1000, 428 S.W.2d 258 (1968).

An action by county taxpayers to recover expense money paid or obtained through mistake by a prosecuting attorney, in the absence of fraud or corruption, is an action founded upon an implied contract, not in writing, and must be commenced within three years under this section. *Munson v. Abbott*, 269 Ark. 441, 602 S.W.2d 649 (1980).

Evidence sufficient to support conclusion that depositor had knowledge of unauthorized withdrawals and yet failed to act within the time allowed under the statute of limitations. *Cooley v. First Nat'l Bank*, 276 Ark. 387, 635 S.W.2d 250 (1982).

Service of Process.

Tort claim was time-barred, even though complaint was filed in a timely manner, where plaintiff did not obtain service on defendant within 120 days pursuant to ARCP 4(i). *Sublett v. Hipps*, 330 Ark. 58, 952 S.W.2d 140 (1997).

Taxes.

Paying taxes on the lands of another under an express promise to repay entitles one to lien, but recovery is limited to three years where statute of limitations is pleaded. *Person v. Cogbill*, 180 Ark. 664, 22 S.W.2d 161 (1929).

A suit brought by commissioners of a road improvement district to collect taxes three years after they became delinquent was barred by limitation. *Tallman v. Board of Comm'rs N. Rd. Imp. Dist.*, 185 Ark. 851, 49 S.W.2d 1039 (1932).

Where one has mistakenly paid taxes on the property of another, the statute of limitations runs from the time of the payment. *Brookfield v. Rock Island Imp. Co.*, 205 Ark. 573, 169 S.W.2d 662 (1943).

Tolling of Statute.

The running of the statute of limitations was tolled while default judgment was set aside; during that time, although the alleged negligent act had occurred, plaintiff had no claim against defendant, as he could have shown no injury. *Stroud v. Ryan*, 297 Ark. 472, 763 S.W.2d 76 (1989).

Lack of knowledge of a cause of action does not stop the statute of limitations from running unless there has been fraud or concealment by the person invoking the defense of limitations or if the statute is otherwise tolled. *Courtney v. First Nat'l Bank*, 300 Ark. 498, 780 S.W.2d 536 (1989).

Employer's offer of employment did not induce employees to forego filing their personal injury claims, and did not bar employer's motion for summary judgment based on the statute of limitations. *Burdine v. Dow Chem. Co.*, 923 F.2d 633 (8th Cir. 1991).

Surviving joint tenant's claim against funds in account commenced running upon the issuance of the certificate, but ceased to exist once he was paid the amount of the deposit, six months later, and the running of the statute was tolled until the probate court issued its order disallowing the accounting, therefore, the complaint, filed only two weeks after that date, was timely. *Smackover State Bank v. Oswalt*, 307 Ark. 432, 821 S.W.2d 757 (1991).

Where plaintiff's alleging fraud in a contract action did not fulfill their duty to exercise reasonable diligence in examining the contract they executed to uncover what they alleged was a fraudulent misrepresentation by the defendant, they could not complain on appeal that the statute of limitations should have tolled. *Wilson v. GE Capital Auto Lease, Inc.*, 311 Ark. 84, 841 S.W.2d 619 (1992).

Where affirmative acts of concealment by the person charged with fraud prevent the discovery of that person's misrepresentations, the statute of limitations will be tolled until the fraud is discovered or should have been discovered with the exercise of reasonable diligence. *Wilson v. GE Capital Auto Lease, Inc.*, 311 Ark. 84, 841 S.W.2d 619 (1992).

Statute of limitations was not tolled, and the statute ran before suit was filed. *Scollard v. Scollard*, 329 Ark. 83, 947 S.W.2d 345 (1997).

The defendant jeweler was not entitled to summary judgment on the basis of the statute of limitations in an action in which the plaintiff alleged that he had switched a diamond for a cubic zirconium since such a switch, if proven, would constitute fraudulent concealment and would toll the statute. *Gibson v. Herring*, 63 Ark. App. 155, 975 S.W.2d 860 (1998).

Any concealment or misrepresentation did not sufficiently toll the limitations period in an action for an alleged breach of contract in connection with a mortgage payment disability insurance policy where the action was not commenced until more than three years after the plaintiff received a copy of the policy. *Elder v. Security Bank*, 68 Ark. App. 132, 5 S.W.3d 78 (1999).

Client's claims of legal malpractice and breach of contract against her former attorney where properly dismissed as time-barred where the client did not file suit

until more than three years after all of the allegations of negligence had occurred; the client's argument that the statute was tolled until she obtained her file was refuted by the client's earlier letter to the attorney asserting negligence. *Parkerson v. Lincoln*, 347 Ark. 29, 61 S.W.3d 146 (2001).

Torts.

Lex fori governs as to limitation of action for common law tort. *Moore v. Winter*, 67 Ark. 189, 53 S.W. 1057 (1899).

An action for damages for wrongful ejection from a train is within the three year limitation of this section. *Saint Louis, I.M. & S. Ry. v. Mynott*, 83 Ark. 6, 102 S.W. 380 (1907).

The limitation fixed by this section governs the right of action for pain and suffering before death in a suit brought by the administrator for the benefit of the estate. *Smith v. Missouri Pac. R.R.*, 175 Ark. 626, 1 S.W.2d 48 (1927).

The three-year statute of limitations applies to all tort actions not otherwise limited by law, where the means of information as to the cause of the injury is equally accessible to both parties and the cause or extent of the injury was not fraudulently concealed. *Burton v. Tribble*, 189 Ark. 58, 70 S.W.2d 503 (1934).

Tort action barred by statute of limitations. *Brown v. Missouri Pac. Transp. Co.*, 189 Ark. 885, 75 S.W.2d 804 (1934); *Faulkner v. Huie*, 205 Ark. 332, 168 S.W.2d 839 (1943); *Orlando v. Alamo*, 646 F.2d 1288 (8th Cir. 1981); *Turner v. Baptist Medical Center*, 275 Ark. 424, 631 S.W.2d 275 (1982); *Simpson v. Bailey*, 279 Ark. 27, 648 S.W.2d 464 (1983); *Cherepski v. Walker*, 323 Ark. 43, 913 S.W.2d 761 (1996).

Tort action not barred by statute of limitations. *Schott v. Colonial Baking Co.*, 111 F. Supp. 13 (W.D. Ark. 1953); *Larson Mach., Inc. v. Wallace*, 268 Ark. 192, 600 S.W.2d 1 (1980).

This section governs actions brought under § 16-62-101(a) as well as personal injury suits brought by an injured party during his lifetime. *Hicks v. Missouri Pac. R.R.*, 181 F. Supp. 648 (W.D. Ark. 1960).

Where deceased was injured as a result of negligence, his cause of action for injuries accrued on the date of injury; where deceased's action was barred by period of limitations, similar action by administra-

trix was also barred, as she occupied the same position as deceased in regard to the action. *Hicks v. Missouri Pac. R.R.*, 181 F. Supp. 648 (W.D. Ark. 1960).

The three year limitation on an action for injury resulting from taking a drug manufactured by the defendant began to run when it became apparent that the injury was permanent. *Schenebeck v. Sterling Drug, Inc.*, 423 F.2d 919 (8th Cir. 1970).

A right of action for injury resulting from taking drug accrued when the patient knew or, in the exercise of ordinary care for her health and safety, could have known that she was injured. *Schenebeck v. Sterling Drug, Inc.*, 291 F. Supp. 368 (E.D. Ark. 1968), *aff'd*, 423 F.2d 919 (8th Cir. 1970).

The statute of limitations on a personal injury action did not run against an incompetent even though a guardian of his estate had been appointed prior to accrual of the cause of action. *Mason v. Sorrell*, 260 Ark. 27, 551 S.W.2d 184 (1976).

The three-year statute applies to all tort actions, including allegations of negligence with respect to sale of securities transaction. *F & M Bank v. Hamilton Hotel Partners Ltd. Partnership*, 702 F. Supp. 1417 (W.D. Ark. 1988).

Where the gist of the complaint clearly sounds in tort, and the court is unable to construe it to include another type action so as to permit the application of a longer statute of limitations, the cause of action will be barred by the three year statute of limitations for torts. *O'Bryant v. Horn*, 297 Ark. 617, 764 S.W.2d 445 (1989).

—Outrage.

Allegations that a doctor had improperly touched, examined, and otherwise fondled plaintiffs' breasts during a physical examination did not allege a complaint of battery, governed by the one-year statute of limitations in § 16-56-104, but stated a cause of action for the tort of outrage, which is governed by the three-year statute of limitations in this section. *McQuay v. Guntharp*, 331 Ark. 466, 963 S.W.2d 583 (1998).

Trespass.

An action for damages for trespass on real property instituted after more than three years since the cause of action arose, but within one year after final judgment

was rendered on demurrer in a previous action on the same cause, was barred by limitations, since former judgment was not a nonsuit. *Thompson v. Pulaski-Lonoke Drainage Dist.*, 192 Ark. 1178, 90 S.W.2d 237 (1936).

Evidence in trespass suit sufficient to bar cause of action by statute of limitation. *Jones v. Brooks*, 233 Ark. 148, 343 S.W.2d 99 (1961).

Court properly denied summary judgment to the oil company, which was one of the defendants in an action by the landowners for damages from defendants' dumping, where the court could not say that a reasonable jury would not find that the three year limitations period under subdivision (4) of this section was tolled under the continuing violation theory. *Sewell v. Phillips Petro. Co.*, 197 F. Supp. 2d 1160 (W.D. Ark. 2002).

District court's verdict was reversed on appeal where the applicable statute of limitations began to run at the latest date the plaintiff lessor learned its land had suffered a remediable injury, though it did not yet know the extent of the injury. *Highland Indus. Park, Inc. v. BEI Def. Sys. Co.*, 357 F.3d 794 (8th Cir. 2004).

Cited: *Meyer v. Cunningham*, 196 Ark. 1097, 121 S.W.2d 90 (1938); *Missouri Pac. R.R. v. Neal*, 212 Ark. 866, 208 S.W.2d 176 (1948); *Collie v. Coleman*, 223 Ark. 206, 265 S.W.2d 515 (1954); *Oklahoma ex rel. Oklahoma Tax Comm'n v. Neely*, 225 Ark. 230, 282 S.W.2d 150 (1955); *Booth v. Hayde*, 228 Ark. 244, 307 S.W.2d 227 (1957); *Baxter v. Young*, 229 Ark. 1035, 320 S.W.2d 640 (1959); *Nelson v. Eckert*, 231 Ark. 348, 329 S.W.2d 426 (1959); *Wilson v. Wilson*, 231 Ark. 416, 329 S.W.2d 557 (1959); *Tollett v. Mashburn*, 183 F. Supp. 120 (W.D. Ark. 1960), *aff'd*, 291 F.2d 89 (8th Cir. 1961); *Carter v. Zachary*, 243 Ark. 104, 418 S.W.2d 787 (1967); *Carter v. Hartenstein*, 248 Ark. 1172, 455 S.W.2d 918 (1970), appeal dismissed, 401 U.S. 901, 91 S. Ct. 868, 27 L. Ed. 2d 800 (1971); *Brown v. United States*, 342 F. Supp. 987 (E.D. Ark. 1972); *Hogue v. Jennings*, 252 Ark. 1009, 481 S.W.2d 752 (1972); *Coleman v. Young*, 256 Ark. 759, 510 S.W.2d 877 (1974); *Midwest Mut. Ins. Co. v. Arkansas Nat'l Co.*, 260 Ark. 352, 538 S.W.2d 574 (1976); *Pruitt v. Pruitt*, 271 Ark. 404, 609 S.W.2d 84 (1980); *Wright v. Langdon*, 274 Ark. 258, 623 S.W.2d 823 (1981); *Fed-*

eral Land Bank v. Wilson, 533 F. Supp. 301 (E.D. Ark. 1982); *Taylor v. Teletype Corp.*, 550 F. Supp. 781 (E.D. Ark. 1982); *Okla Homer Smith Furn. Mfg. Co. v. Larson & Wear, Inc.*, 278 Ark. 467, 646 S.W.2d 696 (1983); *Fuller v. Marx*, 724 F.2d 717 (8th Cir. 1984); *Freeman v. King*, 10 Ark. App. 220, 662 S.W.2d 479 (1984); *Dunlap v. McCarty*, 284 Ark. 5, 678 S.W.2d 361 (1984); *Lacey v. Bekaert Steel Wire Corp.*, 619 F. Supp. 1234 (W.D. Ark. 1985); *Mulligan v. Lederle Labs.*, 786 F.2d 859 (8th Cir. 1986); *Jackson v. Missouri Pac. R.R.*, 803 F.2d 401 (8th Cir. 1986); *Broadhead v. McEntire*, 19 Ark. App. 259, 720 S.W.2d 313 (1986); *Ballheimer v. Service Fin. Corp.*, 292 Ark. 92, 728 S.W.2d 178 (1987); *Rogers Iron & Metal Corp. v. K & M, Inc.*, 22 Ark. App. 228, 738 S.W.2d 110 (1987); *Carton v. Missouri Pac. R.R.*, 295 Ark. 126, 747 S.W.2d 93 (1988); *City of Fayetteville v. Bibb*, 30 Ark. App. 31, 781 S.W.2d 493 (1989); *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989); *Atlanta Exploration, Inc. v. Ethyl Corp.*, 301 Ark. 331, 784 S.W.2d 150 (1990); *Phillips v. Sugrue*, 800 F. Supp. 789 (E.D. Ark. 1992); *Resolution Trust Corp. v. Kerr*, 804 F. Supp. 1091 (W.D. Ark. 1992); *Green v. Bell*, 308 Ark. 473, 826 S.W.2d 226 (1992); *Orsini v. Larry Moyer Trucking, Inc.*, 310 Ark. 179, 833 S.W.2d 366 (1992); *Jackson v. Swift-Eckrich*, 830 F. Supp. 486 (W.D. Ark. 1993), *aff'd sub nom. Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995); *Hicks v. Clark*, 316 Ark. 148, 870 S.W.2d 750 (1994); *Alexander v. Twin City Bank*, 322 Ark. 478, 910 S.W.2d 196 (1995); *Howard v. Northwest Ark. Surgical Clinic*, 324 Ark. 375, 921 S.W.2d 596 (1996); *Kingsbury v. Robertson*, 325 Ark. 12, 923 S.W.2d 273 (1996); *Grace v. Grace*, 326 Ark. 312, 930 S.W.2d 362 (1996); *Calcagno v. Shelter Mut. Ins. Co.*, 330 Ark. 802, 957 S.W.2d 700 (1997); *Colonia Ins. Co. v. City Nat'l Bank*, 13 F. Supp. 2d 891 (W.D. Ark. 1998); *Helms v. University of Missouri-Kansas City*, 65 Ark. App. 155, 986 S.W.2d 419 (1999); *Kohl v. American Home Prods. Corp.*, 78 F. Supp. 2d 885 (W.D. Ark. 1999); *Martin v. Equitable Life Assurance Soc'y of the United States*, 344 Ark. 177, 40 S.W.3d 733 (2001); *Adams v. Wolf*, 73 Ark. App. 347, 43 S.W.3d 757 (2001); *Vanderpool v. Pace*, 351 Ark. 630, 97 S.W.3d 404 (2003); *Shelnutt v. Laird*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 746 (Dec. 2, 2004).

16-56-106. Recovery of charges for medical services.

(a) No action shall be brought to recover charges for medical services performed or provided prior to April 1, 1985, by a physician or other medical service provider after the expiration of a period of eighteen (18) months from the date the services were performed or provided.

(b) No action shall be brought to recover charges for medical services performed or provided after March 31, 1985, by a physician or other medical service provider after the expiration of a period of two (2) years from the date the services were performed or provided or from the date of the most recent partial payment for the services, whichever is later.

History. Acts 1983, No. 638, § 1; 1985, No. 894, § 1; A.S.A. 1947, § 37-245.

CASE NOTES

ANALYSIS

Constitutionality.

Applicability.

Fraud.

Ignorance of right.

Medical service provider.

Partial payment.

Revival of debt.

Constitutionality.

Limitation period in this section is both reasonable and constitutional. *Ballheimer v. Service Fin. Corp.*, 292 Ark. 92, 728 S.W.2d 178 (1987); *HCA Medical Servs. of Midwest, Inc. v. Rodgers*, 292 Ark. 359, 730 S.W.2d 229 (1987).

Applying this section to debt for hospital services incurred prior to the enactment of this section was not unconstitutional. *Thomas v. Service Fin. Corp.*, 293 Ark. 190, 736 S.W.2d 3 (1987).

Applicability.

This section, and not § 16-56-111, covers all actions brought to recover charges for medical services. *Ballheimer v. Service Fin. Corp.*, 292 Ark. 92, 728 S.W.2d 178 (1987).

Limitations period contained in this section, and not that of § 16-56-111, is applicable to a debt for hospital services. *Thomas v. Service Fin. Corp.*, 293 Ark. 190, 736 S.W.2d 3 (1987).

Fraud.

No mere ignorance on the part of the plaintiff of his rights, nor the mere silence of one who is under no obligation to speak, will prevent the statute bar; there must be

some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or perpetrated in a way that it conceals itself. And if the plaintiff, by reasonable diligence, might have detected the fraud, he is presumed to have had reasonable knowledge of it. *Miles v. A.O. Smith Harvestore Prods., Inc.*, 992 F.2d 813 (8th Cir. 1993).

Representations in a seller's promotional magazine which did not contain information regarding problems with a product did not rise to the level of affirmative conduct concealing buyer's cause of action sufficient to toll the statute of limitations. *Miles v. A.O. Smith Harvestore Prods., Inc.*, 992 F.2d 813 (8th Cir. 1993).

Ignorance of Right.

A plaintiff's ignorance of his or her right to sue does not toll the running of the statute of limitations. *Miles v. A.O. Smith Harvestore Prods., Inc.*, 992 F.2d 813 (8th Cir. 1993).

Medical Service Provider.

A psychologist is not a medical service provider within the meaning of this section. *Southwestern Human Servs. Inst., Inc. v. Mitchell*, 287 Ark. 59, 696 S.W.2d 722 (1985).

Hospital held medical service provider. *Ballheimer v. Service Fin. Corp.*, 292 Ark. 92, 728 S.W.2d 178 (1987).

Partial Payment.

A partial payment begins the running of the statute of limitations; a five-dollar payment was sufficient. *Jones v. Hempel*, 316 Ark. 647, 873 S.W.2d 540 (1994).

Revival of Debt.

A lawsuit filed by injured party, in which he sought damages that included his medical expenses, did not demonstrate his acknowledgment of the debt to his medical service providers and was not sufficient to revive the debt. *Kitchens v.*

Evans, 45 Ark. App. 19, 870 S.W.2d 767 (1994).

Cited: *Dupree v. Twin City Bank*, 300 Ark. 188, 777 S.W.2d 856 (1989); *University Hosp. v. Undernehr*, 307 Ark. 445, 821 S.W.2d 26 (1991).

16-56-107. Enforcement of security interest in livestock.

(a) No action to enforce a security interest in livestock shall be brought against a livestock auction market or selling agent who, in the ordinary course of business, sells the livestock for another person in a public auction, more than eighteen (18) months after the date of the sale.

(b) No action to enforce a security interest in livestock against a buyer in the ordinary course of business shall be brought more than eighteen (18) months after the livestock is sold to the buyer.

History. Acts 1985, No. 902, §§ 1, 2; A.S.A. 1947, §§ 37-246, 37-247.

16-56-108. Recovery of statutory penalties.

All actions on penal statutes where the penalty, or any part thereof, goes to the state, or to any county or person suing for the same, shall be commenced within two (2) years after the offense has been committed or the cause of action has accrued.

History. Rev. Stat., ch. 91, § 10; C. & M. Dig., § 6954; Pope's Dig., § 8932; A.S.A. 1947, § 37-204.

CASE NOTES**ANALYSIS**

Applicability.

Disability.

Pleading.

Statute tolled.

Time expired.

Applicability.

An action to enforce a statutory liability which is not a penalty is governed by the three year limitation provided in § 16-56-105. *Nebraska Nat'l Bank v. Walsh*, 68 Ark. 433, 59 S.W. 952 (1900).

This statute cannot be pleaded in bar of the remedial portion of a statute which is both remedial and penal. *McDonald v. Mueller*, 123 Ark. 226, 183 S.W. 751 (1916).

This statute is not applicable to liability for assessment imposed by another state

upon bank stockholders upon insolvency; the liability is contractual rather than in the nature of a penalty. *Hospelhorn v. Burke*, 196 Ark. 1028, 120 S.W.2d 705 (1938).

The environmental protection acts found at §§ 8-4-101 et seq., 8-6-201 et seq., and 8-7-201 et seq., are regulatory and protective rather than penal, and therefore the statute of limitations for penal actions does not apply. *Arkansas ex rel. Bryant v. Dow Chem. Co.*, 981 F. Supp. 1170 (E.D. Ark. 1997).

Disability.

In action for treble damages under § 18-60-102(a) and (b), the two year limitation of this section does not apply where plaintiff was under the age of majority at the time the cause of action arose and brought his action within the limitation of

§ 16-56-116(a). *Callaway v. Perdue*, 238 Ark. 652, 385 S.W.2d 4 (1964).

Pleading.

Actions for the recovery of a statutory penalty are governed by rules of practice in civil action; consequently the statute of limitations must be pleaded, otherwise it is waived as a defense. *Western Union Tel. Co. v. State*, 82 Ark. 309, 101 S.W. 748 (1907).

Statute Tolled.

In a taxpayer action against a sheriff, allegations and proof of fraud and concealment were sufficient to toll any statute of limitations which was applicable. *Thomas*

v. Williford, 259 Ark. 354, 534 S.W.2d 2 (1976).

Time Expired.

In claim for treble damages the trial court did not err in precluding plaintiff from recovering treble damages because the two-year limitation period had expired. *Kutait v. O'Roark*, 305 Ark. 538, 809 S.W.2d 371 (1991).

Cited: *Saint Louis, I.M. & S. Ry. v. State*, 59 Ark. 165, 26 S.W. 824 (1894); *Jackson v. Swift-Eckrich*, 830 F. Supp. 486 (W.D. Ark. 1993), *aff'd sub nom. Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995).

16-56-109. Actions against sheriffs, coroners, and other officials.

(a) All actions against sheriffs and coroners upon any liability incurred by them by doing any act in their official capacity or by the omission of any official duty, except for escapes, shall be brought within two (2) years after the cause of action has accrued and not thereafter.

(b) All actions against sheriffs or other officers for the escape of any person imprisoned on civil process shall be commenced within one (1) year from the time of escape, and not thereafter.

History. Rev. Stat., ch. 91, §§ 8, 9; C. §§ 8930, 8931; A.S.A. 1947, §§ 37-202, & M. Dig., §§ 6952, 6953; Pope's Dig., 37-203.

CASE NOTES

ANALYSIS

Deputies and jailers.

False arrest.

Federal actions.

Pleading.

Statute tolled.

Unlawful taking.

Deputies and Jailers.

Although deputy sheriffs and jailers are not referred to in this section, they are entitled to the benefit of the statute when sued on account of acts or omissions which took place in the course of their official duties. *Brown v. United States*, 342 F. Supp. 987 (E.D. Ark. 1972), modified on other grounds, 486 F.2d 284 (8th Cir. 1973).

False Arrest.

Under this section an action against a sheriff for false arrest must be brought within two years. *Gilpin v. Tack*, 256 F. Supp. 562 (W.D. Ark. 1966).

Federal Actions.

This section applied to an action brought in federal court against an Arkansas jailer for injuries sustained by a federal prisoner at the hands of other inmates while confined in an Arkansas jail. *Brown v. United States*, 342 F. Supp. 987 (E.D. Ark. 1972), modified on other grounds, 486 F.2d 284 (8th Cir. 1973).

The running of the statute was not tolled by the confinement of a plaintiff outside state in a federal penitentiary when he was not so confined at the time his cause of action accrued in view of § 16-56-116 (a) and (b). *Brown v. United States*, 342 F. Supp. 987 (E.D. Ark. 1972), modified on other grounds, 486 F.2d 284 (8th Cir. 1973).

Federal prisoner confined in state jail had to bring negligence claim against sheriff and jailer within time prescribed by this section. *Brown v. United States*, 486 F.2d 284 (8th Cir. 1973).

Pleading.

The plea of the statute of limitations cannot be raised by demurrer, unless the complaint shows not only that the time has elapsed so as to bar the action, but also the nonexistence of any grounds for the avoidance of the statute. State for use of *Glover v. McIlroy*, 196 Ark. 63, 116 S.W.2d 601 (1938).

Statute Tolled.

In a taxpayer action against a sheriff, allegations and proof of fraud and concealment were sufficient to toll any statute of limitations which was applicable. *Thomas v. Williford*, 259 Ark. 354, 534 S.W.2d 2 (1976).

Unlawful Taking.

Action against sureties on bond of former sheriff commenced more than two years after date on which he was required to turn over to his successor property and money in his hands, to recover value of property which the sheriff had attached, was barred by limitations, though filed soon after determination of replevin suit against sheriff. State for use of *Glover v. McIlroy*, 196 Ark. 63, 116 S.W.2d 601 (1938).

Cited: *Jackson v. Swift-Eckrich*, 830 F. Supp. 486 (W.D. Ark. 1993), *aff'd sub nom. Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995).

16-56-110. Sheriffs', coroners', and constables' bonds.

(a) Actions on the official bonds of sheriffs and coroners shall be commenced within four (4) years after the cause of action shall accrue, and not afterward.

(b) A certified copy of the bond shall be evidence in all suits brought on the bond.

(c) No suit shall be brought on any bond of a constable after the expiration of four (4) years from its date.

History. Rev. Stat., ch. 29, § 14; Acts 1844, § 1, p. 24; C. & M. Dig., § 6957; Pope's Dig., § 8935; A.S.A. 1947, §§ 37-207, 37-208.

CASE NOTES**ANALYSIS**

Actions barred.
Actions not barred.
Pleading.
Statute tolled.

Actions Barred.

Suit filed by heirs on sheriff's bond was barred under this section where sheriff left office and filed his last settlement more than four years before suit. *Elmore v. Bishop*, 184 Ark. 243, 42 S.W.2d 399 (1931).

Action against sureties on bond of former sheriff commenced more than four years after date on which he was required to turn over to his successor property and money in his hands, to recover value of property which the sheriff had attached, was barred by limitations, though filed soon after determination of suit in replevin against sheriff. State for use of *Glover v. McIlroy*, 196 Ark. 63, 116 S.W.2d 601 (1938).

Actions not Barred.

Where the county sheriff was receiving expense funds without required proof of expenses, the receipt constituted an illegal exaction and thus the county sheriff was correctly required to account and repay the sums received and the statute of limitations did not bar the action. *Thomas v. Williford*, 259 Ark. 354, 534 S.W.2d 2 (1976).

Pleading.

The plea of the statute of limitations cannot be raised by demurrer, unless the complaint shows not only that the time has elapsed so as to bar the action, but also the nonexistence of any grounds for the avoidance of the statute. State for use of *Glover v. McIlroy*, 196 Ark. 63, 116 S.W.2d 601 (1938).

Statute Tolled.

In a taxpayer action against a sheriff, allegations and proof of fraud and conceal-

ment were sufficient to toll any statute of limitations which was applicable. *Thomas v. Williford*, 259 Ark. 354, 534 S.W.2d 2 (1976).

16-56-111. Notes and instruments in writing and other writings.

(a) Actions to enforce written obligations, duties, or rights, except those to which § 4-4-111 is applicable, shall be commenced within five (5) years after the cause of action shall accrue.

(b) However, partial payment or written acknowledgment of default shall toll this statute of limitations.

History. Acts 1844, § 1, p. 24; 1889, No. 70, § 1, p. 87; C. & M. Dig., §§ 6955, 6956; Pope's Dig., §§ 8933, 8934; A.S.A. 1947, §§ 37-209, 37-210; Acts 1989, No. 644, § 1; 1991, No. 1048, § 1; 1997, No. 1164, § 2.

Publisher's Notes. As to abolition of

distinction between sealed and unsealed instruments executed since the adoption of the Constitution of 1868 and provision that the statute of limitations in regard to sealed and unsealed instruments in force at that time should remain in force until altered, see Ark. Const., Schedule § 1.

RESEARCH REFERENCES

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tation of Actions — Arkansas Extends the Occurrence Rule to Accountants and Recognizes a Tolling Provision in Attorney Malpractice Actions, 13 UALR L.J. 115.

Survey — Debtor/Creditor Relations, 14 UALR L.J. 767.

CASE NOTES

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Construction.

In a breach of contract action for alleged architectural defects, in which a written contract was involved, subsection (b) of this section was the applicable statute of limitations; the existence of § 16-56-112 did not extend the statute of limitations under subsection (b) or otherwise affect its applicability. *Zufari v. Architecture Plus*, 323 Ark. 411, 914 S.W.2d 756 (1996).

Applicability.

Holding that plaintiff suing on a note was a charitable institution and that statute of limitations did not apply to it was error. *McCrite v. Hendrix College*, 198 Ark. 1149, 133 S.W.2d 31 (1939).

The statute of limitations is inapplicable to a suit brought to enforce a trust. *Sprigg v. Wilmans*, 204 Ark. 863, 165 S.W.2d 69 (1942).

Actions by third persons based on written contracts which are made for their benefit are governed by the limitation of this section rather than § 16-56-105. *H.B. Deal & Co. v. Bolding*, 225 Ark. 579, 283 S.W.2d 855 (1955).

Although the trial court determined that the five-year statute of limitations applicable to written contracts applied, where the trial court based its finding of liability against the defendant completely upon the finding that the defendant breached his fiduciary duty to plaintiffs as their attorney and thereby committed malpractice, the applicable statute of limitations as to the defendant was three years. *Smith v. Elder*, 312 Ark. 384, 849 S.W.2d 513 (1993).

In an action involving fraud and a written instrument, the court looks to the gist of the action as alleged to determine which statute of limitations applies. *Ernest F. Loewer, Jr. Farms, Inc. v. National Bank*, 316 Ark. 54, 870 S.W.2d 726 (1994).

Under the express terms of § 16-56-103(b), subsection (b) of this section does not apply to suits to enforce payment of any bills, notes, or evidences of any debt issued by any bank. *Ernest F. Loewer, Jr. Farms, Inc. v. National Bank*, 316 Ark. 54, 870 S.W.2d 726 (1994).

In transferred employees' action under the Labor Management Relations Act, the state statute of limitations for breach of contract was not applicable; applying such would run counter to the policy of rapid final resolutions of labor disputes, and the employer did not actually repudiate the grievance process in the collective bargaining agreement. *Arif v. AT & T Corp.*, 959 F. Supp. 1054 (E.D. Ark. 1997).

In a claim where it was unclear whether plaintiffs were complaining of the circumstances surrounding the execution of a 1993 agreement, or seeking to enforce a 1981 contract breached in 1996, summary judgment based on the running of the 3 year statute of limitations was improper. *Ingram v. Chandler*, 63 Ark. App. 1, 971 S.W.2d 801 (1998).

Loan papers between debtors and bank constituted evidence of a written agreement between debtors and guarantor, and subsection (a) of this section provides that

actions to enforce a written obligation must commence within five years after the cause of action accrues; thus, the trial court erred when it found that the guarantor was seeking contribution and that the cause of action was barred by a three-year statute of limitations. *Hendrickson v. Carpenter*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 880 (Dec. 1, 2004).

Court erred in awarding judgment to plaintiff in his breach of contract action against defendant because plaintiff's earlier failure to comply with the service requirements of Ark. R. Civ. P. 4(i) resulted in a failure to commence the action so as to effectuate the one-year savings provision provided in § 16-56-126; hence, the action was barred by the five-year statute of limitations in subsection (a) of this section. *Long v. Bonds*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 11 (Jan. 5, 2005).

Acceleration Clauses.

Where the debtor defaulted and creditor accelerated the debt, the creditor's cause of action on the debt evidenced by a note did not depend upon any further contingency or condition precedent, as the creditor's right to a deficiency judgment was simply part of a remedial process the creditor initiated by accelerating the debt and could not be treated as a separate cause of action; therefore, the statute of limitations began to run when the creditor accelerated the debt, causing the creditor's complaint seeking a deficiency judgment against the debtor to be barred when brought more than five years after the date the note was accelerated. *Oaklawn Bank v. Alford*, 40 Ark. App. 200, 845 S.W.2d 22 (1992).

Attorneys.

A malpractice suit alleging that the defendant attorneys breached their contract by failing to act with diligence as required by the contract is an action for negligence rather than for breach of contract, and the three year statute of limitations should apply. *Sturgis v. Skokos*, 335 Ark. 41, 977 S.W.2d 217 (1998).

Burden of Proof.

The burden of proof was on the plaintiff suing on notes to establish that they were not barred by limitations which had been pleaded as a defense. *Rose v. Rose*, 184 Ark. 430, 42 S.W.2d 567 (1931).

Plaintiff suing on a note relying upon payments to remove the bar of the statute of limitations has burden to show that the payments were made. *McNeill v. Rowland*, 198 Ark. 1094, 132 S.W.2d 370 (1939).

If in action on promissory note the debtor pleads the statute of limitations as a bar to the action and plaintiff alleges that there has been a part payment on the note, then burden of proof is on the plaintiff to prove date of part payment, and mere endorsement on back of note is not sufficient proof of making of part payment. *Smith v. Grimsley*, 215 Ark. 279, 220 S.W.2d 428 (1949).

Certificate of Deposit.

Under § 4-3-104(j), a certificate of deposit is a negotiable instrument, and an action to enforce such an instrument under Article 3 of the UCC would be subject to the six-year limitation period under § 4-3-118(e), not the five-year limitation period under this section. *Ernest F. Loewer, Jr. Farms, Inc. v. National Bank*, 316 Ark. 54, 870 S.W.2d 726 (1994).

Child Support Agreements.

The period of time for which the mother may recover for the reasonable and definite amount she has expended for the support of the children is governed by the language of the original divorce decree and where, as in the present case, there was no provision in the original divorce decree for support, the obligation of the father would come within the three year statute for such definite amounts as she had expended for the support of the minor children. *Wilder v. Garner*, 235 Ark. 400, 360 S.W.2d 192 (1962).

Civil Rights.

Although employee's 42 U.S.C. § 1981 claim involved a collective bargaining agreement between a union and the employer, the alleged discriminatory practices did not arise from any breach of the collective bargaining agreement and therefore this statute of limitations for actions on written contracts was inapplicable. *Martin v. Georgia-Pacific Corp.*, 568 F.2d 58 (8th Cir. 1977).

Where the plaintiff brought a civil rights complaint involving the termination of the plaintiff's written employment contract, § 16-56-105, governing liabilities created by statute, was the applicable statute of limitations, not this section

which governs actions on written contracts. *Wagh v. Dennis*, 677 F.2d 666 (8th Cir. 1982).

Conditional Promise.

Statute does not run on a conditional promise until the contingency has happened. *Perry v. Cunningham*, 40 Ark. 185 (1882).

Corporations.

The appointment of a receiver will not stop the running of the statute against an insolvent corporation. *Davis v. Scott*, 129 Ark. 226, 195 S.W. 383 (1917).

A complete and present cause of action accrued when assets conveyed in a bill of sale were transferred by person executing bill of sale to a corporation and the stock distributed in violation of the bill of sale, and statute commenced to run from that time. *Hunter v. Connelly*, 247 Ark. 486, 446 S.W.2d 654 (1969).

Date of Accrual.

In a breach of contract action against architectural firm for alleged design defects, the relevant date for accrual of the cause of action for breach was the date the plans were rejected by the Health Department, since on that date the cause of action was complete, and plaintiff was entitled to sue for breach; when he chose not to do so but chose instead to allow defendant to attempt to rectify the problem, that did not alter the fact that a breach had occurred, and thus suit filed more than five years after the breach was untimely. *Zufari v. Architecture Plus*, 323 Ark. 411, 914 S.W.2d 756 (1996).

Debts.

The statute does not begin to run against a note that may be declared due on default in interest until the end of its regular term, unless the payee exercises his option. *Sherwood v. Wilkins*, 65 Ark. 312, 45 S.W. 988 (1898).

The statute runs from the date of a new promise. *Kelley v. Telle*, 66 Ark. 464, 51 S.W. 633 (1899); *Williams v. Young*, 71 Ark. 164, 71 S.W. 669 (1903).

Cause of action accrues at maturity of note. *Rock Island Plow Co. v. Masterson*, 96 Ark. 446, 132 S.W. 216 (1910).

A right to enforce a mortgage lien acquired by the right of subrogation will not be barred where the debt has been kept alive by a new note executed by the debtor.

Roark v. Matthews, 125 Ark. 378, 188 S.W. 841 (1916).

The statute of limitations begins to run against the creditor of an insolvent corporation whenever he has notice that the corporation is insolvent, and notice may be presumed when the insolvency becomes a matter of general notoriety. *Davis v. Scott*, 129 Ark. 226, 195 S.W. 383 (1917).

Demand paper is due immediately, and the statute of limitations begins to run from the date of the instrument. *McCollum v. Neimeyer*, 142 Ark. 471, 219 S.W. 746 (1920).

A cause of action on a note is not barred where an action was brought on it within five years from maturity where the action was dismissed and new action brought within a year on the same cause of action. *Felker v. Boatmen's Bank*, 146 Ark. 186, 225 S.W. 306 (1920).

Evidence held to sustain a finding that the defendant's consent to the crediting of the amount owed by the payee of a note to the defendant on the note which the defendant had executed did not constitute an acknowledgement of the debt sufficient to form a basis of a new promise, tolling the statute of limitations on the note. *Sanders v. McClintock*, 175 Ark. 633, 300 S.W. 408 (1927).

The cause of action on a promissory note does not accrue until the day following the date of its maturity. *Shanks v. Clark*, 175 Ark. 883, 300 S.W. 453 (1927).

Where a cause of action on a note is barred by limitations, a mortgage securing the note is likewise barred. *Taylor v. Cheairs*, 181 Ark. 4, 24 S.W.2d 852 (1930).

The right of action by a joint maker of a note who paid it for contribution is based on an implied obligation, and not governed by the limitation prescribed by this section. *Hazel v. Sharum*, 182 Ark. 557, 32 S.W.2d 315 (1930).

Where a debt is secured by a pledge, the running of the statute of limitations destroys the right of recovery on the debt, but it has no effect on the right of the pledgee to retain the property or enforce his claim against it, until the debt is paid. *Hill v. Bush*, 192 Ark. 181, 90 S.W.2d 490 (1936).

Plaintiffs took title free from lien of mortgages which had been kept alive by tax payments made by mortgagee. *Polster v. Langley*, 201 Ark. 396, 144 S.W.2d 1063 (1940).

Recital in notes that drawers and endorsers waived presentation for payment, protest and nonpayment, and granted to holder right to grant extensions without notifying them, was held not to apply to payee who subsequently endorsed the notes and who could only be bound for five years from due date of notes. *Mayberry v. Penn*, 201 Ark. 756, 146 S.W.2d 925 (1941).

When recovery is sought on an obligation payable in installments, this statute runs against each installment from the time it becomes due. *Linke v. Kirk*, 204 Ark. 393, 162 S.W.2d 39 (1942); *Wilson v. Wilson*, 231 Ark. 416, 329 S.W.2d 557 (1959).

Written contract for repurchase, executed by parties thereto for specific purpose of preventing foreclosure of deed of trust, including original debt as the consideration thereof, tolled the statute of limitations and made a new point for it to begin to run. *Walker v. Mullins*, 204 Ark. 939, 165 S.W.2d 607 (1942).

A note payable on demand is due immediately upon its execution, and the statute of limitations runs from that date, unless there is a subsequent unconditional promise to pay by the party from whom the debt is due, which is sufficient to toll the statute. *McMahon v. O'Keefe*, 213 Ark. 105, 209 S.W.2d 449 (1948).

Where the maker of a note payable on demand writes letters acknowledging the validity of the debt due and by inference promises to pay, the acts on the part of the debtor are sufficient to toll the statute of limitations. *McMahon v. O'Keefe*, 213 Ark. 105, 209 S.W.2d 449 (1948).

Where plaintiff filed suit on promissory note more than five years after due date and unauthorized payments were made on the note, the payments did not toll the statute, and action upon the note was therefore barred. *Sutterfield v. Smith*, 216 Ark. 41, 223 S.W.2d 1018 (1949).

Suit, by holders of unpaid installment bonds of drainage district, to collect bonds and interest was not barred where each annual report of district's receiver acknowledged the bonds and interest as obligations of the drainage district. *Greer v. Blocker*, 218 Ark. 259, 236 S.W.2d 68 (1951).

Three year limitation of § 16-56-105 applicable to oral contracts governed the transaction where borrower pledged a

note for repayment of oral loan rather than the limitation of this section. *Shelton v. Harris*, 225 Ark. 855, 286 S.W.2d 20 (1956).

Where parties enter into a written stipulation as to the amount of indebtedness which is sworn to before a notary public, the instrument constitutes an account stated and starts the running of this section anew. *Johnson v. Gammill*, 231 Ark. 1, 328 S.W.2d 127 (1959).

In action to recover delinquent payments which is filed more than five years after the last payment was made, plaintiff can recover only those installments due and accruing within five years before the filing of petition. *Wilson v. Wilson*, 231 Ark. 416, 329 S.W.2d 557 (1959).

A suit on a note filed less than five years after the note was executed was within the limitation of this section. *Wallace v. Hamilton*, 238 Ark. 406, 382 S.W.2d 363 (1964).

An alleged oral extension agreement for which the record shows no semblance of valid consideration is not sufficient to toll the running of the statute. *Holmes v. Thompson*, 240 Ark. 818, 402 S.W.2d 400 (1966).

Creditor's action was not barred by the statute of limitations on default on balloon payment. *Delta Oil Co. v. Catalani*, 276 Ark. 66, 633 S.W.2d 1 (1982).

If a check, pledged as security was non-negotiable, that fact alone would not discharge the liability of the drawer of the check who remained secondarily liable on the check until the statute of limitations ran or until its liability was otherwise discharged. *Wildman Stores, Inc. v. Carlisle Distrib. Co.*, 15 Ark. App. 11, 688 S.W.2d 748 (1985).

When recovery is sought on an obligation payable in installments, the statute of limitations runs against each installment from the time it becomes due; therefore, where the debtor made partial payments in each year since the execution of the note, with the most recent payment being made in 1985, the statute of limitations would not run for actions on the note until 1990, five years from the date of the last payment. *In re Borum*, 60 Bankr. 516 (Bankr. E.D. Ark. 1986).

When recovery is sought on an obligation payable in installments, the statute of limitations runs against each installment from the time it becomes due; that

is, from the time when an action might be brought to recover it. *Bank of N.Y. v. University Partners, Ltd.*, 719 F. Supp. 1479 (W.D. Ark. 1989).

Where a foreclosure suit was filed on March 13, 1991 regarding a promissory note that was signed on March 15, 1982, with the first payment due on March 15, 1983, and where no payments were made, plaintiffs were barred by law from recovering those payments that became due prior to March 13, 1986, due to the five-year statute of limitations. *Karnes v. Marrow*, 315 Ark. 37, 864 S.W.2d 848 (1993).

—Acceleration Clauses.

Acceleration clause contained in note and mortgage for benefit of payee and enforceable at his option was held not to start the statute of limitations running upon failure to make payment of interest. *Hodges v. Taft*, 194 Ark. 259, 106 S.W.2d 605 (1937).

Statute of limitations began to run when default was made in payment of first note. *Hodges v. Dilatush*, 199 Ark. 967, 136 S.W.2d 1018 (1940).

Where an automatic acceleration clause occurs if an installment of interest is not paid within thirty days after due date, but there is no declaration that a default in the payment of an installment of the principal accelerates the maturity of the debt, the statute is a bar only to those installments over five years due, where there is no testimony as to a default in interest. *Holmes v. Thompson*, 240 Ark. 818, 402 S.W.2d 400 (1966).

—Assumption of Debts.

Whether an incoming partner becomes liable on an existing note of the old partnership depends on whether he assumed the indebtedness; in the absence of assumption he will not be bound by payments made by a member of the old firm nor precluded from pleading the statute of limitations against the note. *Stephens v. Neely*, 161 Ark. 114, 255 S.W. 562, 45 ALR 1236 (1923).

The right of a husband to be subrogated to the lien of a mortgagee on his wife's land which he had discharged after her death is to use the mortgage just as the original holder thereof might have done, and the devolution of the cause of action does not interrupt the running of the statute. *Ogden v. Watts*, 186 Ark. 500, 54 S.W.2d 292 (1932).

Since the assumption of payment of the note by the different grantees in the deeds appearing in the plaintiff's chain of title was made within five years before the institution of the suit, the lien of the mortgage was kept alive, although the debt as against the original payor was barred by the statute of limitations. *Webb v. Alexander*, 195 Ark. 727, 113 S.W.2d 1095 (1938).

—Endorsement of Payments.

Payments, endorsed on a note, which were admitted by the debtor to be correct or were impliedly assented to by him are sufficient to stop the running of the statute of limitations. *McAbee v. Wiley*, 92 Ark. 245, 122 S.W. 623 (1909).

The date of a payment on a note and not the endorsement or entry of it marks the time of the interruption of the statute unless a future date is agreed upon by the parties. *Slagle v. Box*, 124 Ark. 43, 186 S.W. 299 (1916).

The running of the statute of limitations is not estopped by endorsements of payments on a note not shown to have been made by the defendant. *Kory v. East Ark. Lumber Co.*, 181 Ark. 478, 26 S.W.2d 896 (1930).

The presence or absence of endorsement of credits or other payments on the back of a note is not conclusive proof that payments tolling the statute were or were not made. *Schaefer v. Baker*, 181 Ark. 620, 27 S.W.2d 83 (1930).

It is the fact of payment on the note and not the endorsement thereon that tolls the statute. *Reynolds v. Union Bank & Trust Co.*, 182 Ark. 861, 33 S.W.2d 403 (1930).

Payments need not be endorsed as credits on back of note to arrest the running of the statute of limitations; it is the fact of payment and not its endorsement that tolls the statute. *McNeill v. Rowland*, 198 Ark. 1094, 132 S.W.2d 370 (1939).

Where order of dismissal in 1938 was final determination of mortgage foreclosure suit filed in 1931 with notice of lis pendens and it reinstated the mortgage in full force and effect as though no suit had been filed, order was binding on judgment creditors of mortgagor who secured judgment after beginning of suit and precluded them from contending that subsequent foreclosure suit was barred by limitations for failure to make marginal endorsements of payment within five

years. *Mitchell v. Federal Land Bank*, 206 Ark. 253, 174 S.W.2d 671 (1943).

—Multiple Debts.

Where one owed a note at a bank barred by the statute of limitations and thereafter made a deposit in the bank, it was held that the bank had the right to credit this deposit on the note but the right to so credit the deposit did not toll the statute of limitations. *Desha Bank & Trust Co. v. Quilling*, 118 Ark. 114, 176 S.W. 132, 1915E L.R.A. 794 (1915).

A creditor may not arbitrarily apply payments made upon unmatured obligations where there are debts past due upon which the same may be applied; so payments by a debtor cannot be arbitrarily applied by the creditor to the payment of unearned interest to create a presumption that the statute of limitations was to run from that time. *Gunther v. Cotner*, 192 Ark. 498, 92 S.W.2d 865 (1936).

Holder of note could not apply payment for one debt to another debt so as to toll the statute of limitations. *Piggot Nursery Co. v. Davis*, 195 Ark. 738, 113 S.W.2d 1102 (1938); *Higginbotham v. Ritter*, 202 Ark. 412, 150 S.W.2d 620 (1941); *Nelson v. Rutledge*, 229 Ark. 464, 316 S.W.2d 346 (1958).

Where deed of trust was executed by defendant to secure a single indebtedness evidenced by three notes, payments which were an acknowledgment of the entire indebtedness should have first been credited to interest on entire indebtedness and not to any single note, and payment within five years kept the entire debt alive so that none of the notes were barred by this statute. *Rich v. Hankins*, 203 Ark. 1082, 160 S.W.2d 44 (1942).

—Payments.

If payment of a promissory note is demanded on the third day of grace, and refused, the statute runs from that day; otherwise not till the next day. *Holland v. Clark*, 32 Ark. 697 (1878).

County warrants are always receivable for taxes, regardless of the date of their issue. *Daniel v. Askew*, 36 Ark. 487 (1880); *Howell v. Hogins*, 37 Ark. 110 (1881); *Whitthorne v. Jett*, 39 Ark. 139 (1882); *Lusk v. Perkins*, 48 Ark. 238, 2 S.W. 847 (1886); *Hill v. Logan County*, 57 Ark. 400, 21 S.W. 1063 (1893).

The five year limitation may be pleaded

in bar for a petition for mandamus to compel the payment of warrants. *Crudup v. Ramsey*, 54 Ark. 168, 15 S.W. 458 (1891).

Where more than five years elapsed between the last payment on a note and the date action thereon was commenced against the principal and sureties, the claim is barred as against the sureties. *Polk v. Stephens*, 118 Ark. 438, 176 S.W. 689 (1915).

Part payment of a debt by a joint and several debtor before the bar of the statute of limitations attaches binds the other joint debtors. *Fendley v. Shults*, 142 Ark. 180, 218 S.W. 197 (1920).

Payment of interest on a note within the statutory period stops the running of the statute of limitations. *Conley v. Archillion*, 146 Ark. 64, 225 S.W. 5 (1920).

Where a note sued on was barred by the statute of limitations at the time when the last payment thereon was made, the payment revived the deed and it was not necessary to pay in money where the satisfaction of demands of the maker against others was treated by all parties as payment of the amount endorsed on the note. *Johnson v. Spangler*, 176 Ark. 328, 2 S.W.2d 1089, 59 ALR 899 (1928).

A sale of mortgaged chattels by the mortgagee and application of the proceeds on a mortgage note was in effect the foreclosure of the mortgage and not such voluntary payment as would toll the statute of limitations. *Taylor v. White*, 182 Ark. 433, 31 S.W.2d 745 (1930).

Where a mortgage executed by a wife was barred by the statute of limitations when the husband paid the note, the payment did not revive the lien nor was the lien acquired by subrogation. *Ogden v. Watts*, 186 Ark. 500, 54 S.W.2d 292 (1932).

Where, in an action on a promissory note, the only issue involved was whether payments had been made which tolled the statute of limitations, an instruction by the court in which the jury was told that the burden rested on the plaintiff to prove his claim by a preponderance of the evidence, necessarily meant that the burden rested upon him to show that payments were made which prevented the note from being barred by the statute. *Vittitow v. Lewis*, 193 Ark. 318, 100 S.W.2d 89 (1936).

A payment by the trustee in bankruptcy to the creditor of a bankrupt will not prevent the running of the statute of limitations since the payment was not a vol-

untary payment. *Bank of Searcy v. Kroh*, 195 Ark. 785, 114 S.W.2d 26 (1938).

Maker's subsequent promise, in answer to request for payment of note, to pay \$500 at a certain date and \$100 a month thereafter, was evidence sufficient to toll statute of limitations. *Cady v. Guess*, 197 Ark. 611, 124 S.W.2d 213 (1939); *Dunnington v. Taylor*, 198 Ark. 770, 131 S.W.2d 627 (1939); *Young v. Blocker*, 201 Ark. 802, 146 S.W.2d 902 (1941); *Hobson v. Priddy*, 204 Ark. xviii, 165 S.W.2d 73 (1942).

Payments on a debt after the bar of the statute of limitations had attached, as between the parties, removes the bar and revives the debt. *McNeill v. Rowland*, 198 Ark. 1094, 132 S.W.2d 370 (1939).

Suits on notes upon which no payments have been made are barred in five years after maturity. *Leverett v. Williamson*, 199 Ark. 910, 136 S.W.2d 478 (1940).

To extend time for the filing of an action upon the indebtedness, the acknowledgment thereof must be an unconditional promise to pay or must be under such circumstances that an unconditional promise to pay may be inferred and it must be made by the party from whom the debt is due to one whom it is due or to his or her authorized agent. *Root v. Thomas*, 203 Ark. 1078, 160 S.W.2d 46 (1942).

Where part payment is accompanied by circumstances or declarations by the debtor showing it was not his intention to admit by the payment continued existence of the debt and his obligation to pay the balance, the law does not imply a promise. *Buss v. Cooley*, 205 Ark. 42, 167 S.W.2d 867 (1942).

Part payment of a debt by one joint and several debtors before action on note is barred by statute of limitations, is binding on the other debtors. *Smith v. Grimsley*, 215 Ark. 279, 220 S.W.2d 428 (1949).

Part payment by one joint and several debtor after action on the debt is barred by statute of limitations is not binding on the other debtors. *Smith v. Grimsley*, 215 Ark. 279, 220 S.W.2d 428 (1949).

If part payment is made on a promissory note, statute of limitations starts running from the date of the part payment. *Smith v. Grimsley*, 215 Ark. 279, 220 S.W.2d 428 (1949).

Bank, which advanced additional money on first mortgage loan after knowledge that agent of mortgagor had made an unrecorded payment within five year pe-

riod on prior mortgage, was entitled to recover entire amount of loan, since prior mortgage was in effect a prior unrecorded mortgage. *Tucker v. Atkinson*, 219 Ark. 921, 245 S.W.2d 388 (1952).

Signer of mortgage notes was estopped to plead statute of limitations in suit by mortgagee to foreclose where payment was made on the obligation within five year period by virtue of apparent authority to make payment as agent. *Tucker v. Atkinson*, 219 Ark. 921, 245 S.W.2d 388 (1952).

Trustee of property was not a third party within meaning of § 18-49-101 (a)-(c), hence he was bound by payments made on mortgage. *Tucker v. Atkinson*, 219 Ark. 921, 245 S.W.2d 388 (1952).

Where evidence sustained finding that there had been payments of interest on notes then suit on notes and to foreclose vendor's lien would not be barred by five year statute of limitation. *Affholter v. McCarley*, 226 Ark. 735, 293 S.W.2d 698 (1956).

Part payment interrupts the running of this section. *Johnson v. Gammill*, 231 Ark. 1, 328 S.W.2d 127 (1959).

Where a mortgage was given to secure an initial loan and future advances and, at a time when there were several notes outstanding, the debtor wrote to the creditor offering to pay part but not all of the amount but not on his account identifying the notes he was offering to pay on, the letter was presumed to be an acknowledgement of the entire indebtedness and revived the statute as to the whole. *McHenry v. Littleton*, 237 Ark. 483, 374 S.W.2d 171 (1964).

The ledger crediting of the maker's credit balance on an open account with the holder of notes as payment on the notes, with the consent of the maker, stopped the running of the statute of limitations, notwithstanding failure of the holder of the notes and the mortgage securing them to endorse the payment on the margin of the recorded mortgage. *Misenhimer v. Perkins Oil Co.*, 248 Ark. 434, 451 S.W.2d 864 (1970).

Decedent's Estate.

Running of statute is not suspended by death of maker of note until letters of administration are granted. *Whipple v. Johnson*, 66 Ark. 204, 49 S.W. 827 (1899); *Salinger v. Black*, 68 Ark. 449, 60 S.W. 229

(1900); *A.R. Bowdre & Co. v. Pitts*, 94 Ark. 613, 128 S.W. 57 (1910).

A suit on a contract to make a will accrues against the co-heirs on the promisor's death, and is governed by this statute as to limitations. *Goff v. Beaty*, 157 Ark. 212, 247 S.W. 787 (1923).

Conveyance of property in return for promise to care for person did not bar person from seeking accounting, and trial court correctly applied five-year, rather than three-year, statute of limitations to accounting since daughter's obligation arose from written deeds not oral or implied promise. *Cluck v. Mack*, 278 Ark. 506, 647 S.W.2d 442 (1983).

Ejectment.

In an ejectment matter, the statute of limitations for removal of a person from land, rather than the statute of limitations for cancellation of instruments, applies. *Schwarz v. Colonial Mtg. Co.*, 326 Ark. 455, 931 S.W.2d 763 (1996).

Goods.

A shipper of freight may recover damages for delay in the transportation and delivery of freight in an action founded on the contract, and the five year statute applies to a claim founded on such a contract. *Chicago, R.I. & P. Ry. v. Cunningham Comm. Co.*, 127 Ark. 246, 192 S.W. 211 (1917).

Insurance.

An action on a policy of disability insurance for monthly disability benefits was held not barred by the five year statute of limitations though recovery was limited to the five years preceding the filing of the action. *Aetna Life Ins. Co. v. Langston*, 189 Ark. 1067, 76 S.W.2d 50 (1934); *Pacific Mut. Life Ins. Co. v. Jordan*, 190 Ark. 941, 82 S.W.2d 250 (1935).

Where insured and beneficiary assigned life policy to secure indebtedness, beneficiary was not entitled, after insured's death, to maintain an action for the proceeds of the policy without paying the debt, even though the debt was barred by limitations. *Hill v. Bush*, 192 Ark. 181, 90 S.W.2d 490 (1936).

Suit instituted more than five years after injury to recover under disability clause of insurance policy was barred by limitations. *Teague v. National Life Co.*, 204 Ark. 196, 161 S.W.2d 754 (1942).

Where tie-in line was not constructed

under original contract for electrical construction on which the statute would have run but was constructed under separate agreement which was not yet barred, contractee's suit for indemnity against contractor on indemnity agreement on judgment recovered by employee for injuries sustained was not barred by this section. *Kincade v. C & L Rural Elec. Coop. Corp.*, 227 Ark. 321, 299 S.W.2d 67 (1957).

There was no evidence of record that insurance company attempted to fraudulently conceal, cover-up, or misrepresent to an estate the problem of determining the proper beneficiary of an insurance policy, so that fraud did not suspend the running of the statute of limitations. *First Pyramid Life Ins. Co. of Am. v. Stoltz*, 311 Ark. 313, 843 S.W.2d 842 (1992), cert. denied, 510 U.S. 908, 114 S. Ct. 290, 126 L. Ed. 2d 239 (1993).

Insured's declaratory relief action to determine the availability of underinsured motorist benefits was an action to recover a claim arising under a policy of insurance and was governed by the five-year statute of limitation in this section; in addition, the running of the statute of limitation was triggered by the breach of the contract and not the underlying accident. *Shelter Mut. Ins. Co. v. Nash*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 362 (June 3, 2004).

Installment payments.

When an obligation is made payable by installments, the statute of limitations runs against each installment as it becomes due and unpaid. *Riley v. Riley*, 61 Ark. App. 74, 964 S.W.2d 400 (1998).

Medical Services.

Section 16-56-106, and not this section, covers all actions brought to recover charges for medical services. *Ballheimer v. Service Fin. Corp.*, 292 Ark. 92, 728 S.W.2d 178 (1987).

Limitations period contained in § 16-56-106, and not that of this section, is applicable to a debt for hospital services. *Thomas v. Service Fin. Corp.*, 293 Ark. 190, 736 S.W.2d 3 (1987).

Pleadings.

Amendment to more than five years after cause accrued, where the original complaint was filed within the five year period, was not the bringing of a new cause of action, and the cause of action

was not barred. *McGraw v. Miller*, 184 Ark. 916, 44 S.W.2d 366 (1931).

If a party had such an interest in the note sued on as entitled it to maintain a suit for the use and benefit of another, the filing of its complaint would serve to toll the statute of limitations, and any pleading filed thereafter by way of amendment would relate back to the institution of the original action; but if it did not have such a cause of action, the amendment to the complaint offered by the second party was only an effort to substitute the party in interest for one who had no cause of action which cannot be permitted. *Floyd Plant Food Co. v. Moore*, 197 Ark. 259, 122 S.W.2d 463 (1938).

The defense of limitations may be raised by motion to dismiss. *Adams v. Greer*, 114 F. Supp. 770 (W.D. Ark. 1953).

Real Estate Interests.

An action for breach of a contract by the plaintiff's predecessor in title to open an alley between the lot conveyed and an adjacent lot before selling the latter which he sold three years prior to bringing suit was held not barred by the statute of limitations. *Holthoff v. Joyce*, 174 Ark. 248, 294 S.W. 1006 (1927).

Where mortgagee within five years from maturity date of note and institution of foreclosure suit had redeemed the land from tax sale and paid the taxes thereon, under the power so to do given in the mortgage, foreclosure suit was not barred by this statute. *Dalton v. Polster*, 200 Ark. 168, 138 S.W.2d 64 (1940).

Lien of attorney on land of estate made a part of the conveyance by the executrix could not be asserted after eight years. *Tellier v. Darragh*, 220 Ark. 363, 247 S.W.2d 960 (1952).

Where claimant did not file his affidavit with the real estate commission until more than five years after he signed the purchase agreements, his claim was not barred as the period of limitations for contracts runs from the point at which the cause of action accrues, rather than from the date of the agreement. *Eckels v. Arkansas Real Estate Comm'n*, 30 Ark. App. 69, 783 S.W.2d 864 (1990).

—Abstractors.

The right of action against an abstractor for damages resulting from errors, defects, or omissions in an abstract of title

prepared by him is not and cannot be based on the written certificate attached to the abstract because the written certificate is only evidence of the provisions of the preexisting oral or implied contract of employment. *Adams v. Greer*, 114 F. Supp. 770 (W.D. Ark. 1953).

The right of action against an abstractor for damages resulting from errors, defects, or omissions in an abstract of title prepared by him accrues at the time of the delivery of the abstract. *Adams v. Greer*, 114 F. Supp. 770 (W.D. Ark. 1953).

In action for dissolution of alleged partnership formed for the purpose of selling lots and on accounting for plaintiff's alleged interest in the property covering the lots, recovery could not be had where it was shown that suit was commenced after the five-year period. *Booth v. Hayde*, 228 Ark. 244, 307 S.W.2d 227 (1957).

—Deeds.

A deed, signed by grantor alone when accepted by the grantee, becomes the mutual contract of the parties and any promise of the grantee therein provided for is governed by the provision of the statute of limitations respecting written instruments. *Parker v. Carter*, 91 Ark. 162, 120 S.W. 836 (1909).

Where the grantee in a deed as consideration undertook to maintain the grantors during life, the contract was not barred by limitations where the grantee never repudiated the obligation. *Federal Land Bank v. Miller*, 184 Ark. 415, 42 S.W.2d 564 (1931).

Grantor's action for breach of covenant in deed was barred by limitation of this section where action was commenced more than five years after right of action occurred. *Roemhild v. Jones*, 283 F.2d 70 (8th Cir. 1960).

In suit to cancel deed, plaintiff could not invoke the aid of equity without first doing equity herself by recognizing the validity of the grantee's lien; therefore, she could not contend that his claims were barred by the five-year statute of limitations. *Daniels v. Johnson*, 234 Ark. 315, 351 S.W.2d 853 (1961).

An action for breach of warranty in a deed was not barred by the three year statute, as actions on writings under seal are not barred until five years after the cause of action accrues. *Booth v. Mason*, 241 Ark. 144, 406 S.W.2d 715 (1966).

In a case concerning a real estate transaction in which the deed was held in escrow until purchaser's six-month note came due, five-year statute of limitations did not begin to run until the note became due. *Woods v. Wright*, 254 Ark. 297, 493 S.W.2d 129 (1973).

—Property Settlement Agreement.

Where the property settlement agreement was an independent contract that was incorporated into the court decree, it did not merge into the decree and was, therefore, subject to the five-year statute of limitations under this section, and not the ten-year limitations period in § 16-56-114. *Meadors v. Meadors*, 58 Ark. App. 96, 946 S.W.2d 724 (1997).

Retirement Benefits.

This section applied to a claim in federal court for retirement benefits under federal statute. *Bennett v. Federated Mut. Ins. Co.*, 141 F.3d 837 (8th Cir. 1998).

Service Contracts.

Where the services in question were rendered upon a written contract to which the five-year statute of limitations applied, the plea of the statute was unavailing where the services were rendered within such period. *Central Clay Drainage Dist. v. Hunter*, 174 Ark. 293, 295 S.W. 19 (1927).

Waiver.

An agreement to waive the statute of limitations for all time, made at the inception of a contract, is void because it violates public policy. *First Nat'l Bank v. Arkansas Dev. Fin. Auth.*, 44 Ark. App. 143, 870 S.W.2d 400 (1994).

Written Instruments.

Where the various written communications between the parties contain all the terms of sale, the five-year limitation applies. *Sims v. Miller*, 151 Ark. 377, 236 S.W. 828 (1922).

Where the plaintiff entered into a written contract for the sale of merchandise, and certain of the defendants at the time of the execution of the contract joined therein for the purpose of becoming guarantors of the purchasers, a suit upon the agreement is upon a written contract to which the five-year statute of limitations applies, though an account of the purchases under the agreement is filed with

the complaint. *W.T. Rawleigh Co. v. Pritchard*, 151 Ark. 390, 236 S.W. 833 (1922).

A bill of lading is an instrument in writing, and the five-year statute applies to suit to recover on it. *Missouri Pac. R.R. v. Pfeiffer Stone Co.*, 166 Ark. 226, 266 S.W. 82 (1924).

This section applies to a buyer's action for damages for breach of warranty arising from a written contract of sale. *Louisville Silo & Tank Co. v. Thweatt*, 174 Ark. 437, 295 S.W. 710 (1927).

An order for merchandise, given over the telephone but later confirmed in writing and accepted by the seller shipping the hose and rendering an invoice, was held a written contract within the five-year statute. *Fort Smith v. United States Rubber Co.*, 184 Ark. 588, 42 S.W.2d 1004 (1931).

The fact that oral proof was required to identify plaintiffs as third party beneficiaries under a written contract and to establish the amount due each under the provisions of the contract did not prevent the five-year limitation of this section rather than the three year limitation of § 16-56-105 from applying. *H.B. Deal & Co. v. Bolding*, 225 Ark. 579, 283 S.W.2d 855 (1955).

Suit on written support contract made in contemplation of divorce is a suit on a written instrument and is governed by the five-year statute of limitations. *Altman v. Altman*, 240 Ark. 370, 399 S.W.2d 501 (1966).

District court's verdict was reversed on appeal where the applicable statute of limitations began to run at the latest date the plaintiff lessor learned its land had suffered a remediable injury, though it did not yet know the extent of the injury; thus, the breach of contract claim was timely. *Highland Indus. Park, Inc. v. BEI Def. Sys. Co.*, 357 F.3d 794 (8th Cir. 2004).

Cited: *Equitable Life Assurance Soc'y v. Gordy*, 228 Ark. 643, 309 S.W.2d 330 (1958); *Fuller v. Fuller*, 240 Ark. 475, 400 S.W.2d 283 (1966); *Carter v. Zachary*, 243 Ark. 104, 418 S.W.2d 787 (1967); *Federal Land Bank v. Wilson*, 533 F. Supp. 301 (E.D. Ark. 1982); *Broadhead v. McEntire*, 19 Ark. App. 259, 720 S.W.2d 313 (1986); *Coast-to-Coast Stores, Inc. v. Citizens Bank*, 676 F. Supp. 923 (E.D. Ark. 1987); *Refco, Inc. v. Farm Prod. Ass'n*, 844 F.2d 525 (8th Cir. 1988); *O'Bryant v. Horn*, 297 Ark. 617, 764 S.W.2d 445 (1989); *Morgan Distrib. Co. v. Unidynamic Corp.*, 868 F.2d 992 (8th Cir. 1989); *Ferguson v. Order of United Com. Travelers of Am.*, 307 Ark. 452, 821 S.W.2d 30 (1991); *Hampton v. Taylor*, 318 Ark. 771, 887 S.W.2d 535 (1994); *Kinthead v. Estate of Kinthead*, 51 Ark. App. 159, 912 S.W.2d 442 (1995); *Chalmers v. Toyota Motor Sales, USA, Inc.*, 326 Ark. 895, 935 S.W.2d 258 (1996); *Federal Fin. Co. v. Noe*, 335 Ark. 78, 983 S.W.2d 107 (1998); *Martin v. Equitable Life Assurance Soc'y of the United States*, 344 Ark. 177, 40 S.W.3d 733 (2001); *Wilkins v. Hartford Life & Accident Ins. Co.*, 299 F.3d 945 (8th Cir. 2002).

16-56-112. Design, planning, supervision, or observation of construction, repair, etc. — Actions for property damage, personal injury, or wrongful death.

(a) No action in contract, whether oral or written, sealed or unsealed, to recover damages caused by any deficiency in the design, planning, supervision, or observation of construction or the construction and repair of any improvement to real property or for injury to real or personal property caused by such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, or observation of construction or the construction or repair of the improvement more than five (5) years after substantial completion of the improvement.

(b)(1) No action in tort or contract, whether oral or written, sealed or unsealed, to recover damages for personal injury or wrongful death caused by any deficiency in the design, planning, supervision, or observation of construction or the construction and repairing of any

improvement to real property shall be brought against any person performing or furnishing the design, planning, supervision, or observation of construction or the construction and repair of the improvement more than four (4) years after substantial completion of the improvement.

(2) Notwithstanding the provisions of subdivision (b)(1) of this section, in the case of personal injury or an injury causing wrongful death, which injury occurred during the third year after the substantial completion, an action in tort or contract to recover damages for the injury or wrongful death may be brought within one (1) year after the date on which injury occurred, irrespective of the date of death, but in no event shall such an action be brought more than five (5) years after the substantial completion of construction of such improvement.

(c) The foregoing limitations shall also apply to any action for damages caused by any deficiency in surveying, establishing, or making the boundaries of real property, the preparation of maps, or the performance of any other engineering or architectural work upon real property or improvements to real property.

(d) The limitations prescribed by this section shall not apply in the event of fraudulent concealment of the deficiency, nor shall the limitation be asserted by way of defense by any person in actual possession or control, as owner, tenant, or otherwise, of such an improvement at the time any deficiency in the improvement constitutes the proximate cause of the injury or death.

(e) If a person furnishes designs or plans which are not used within three (3) years from the date they are furnished, no action shall lie against that person for deficiency in the designs or plans.

(f) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any cause of action, nor shall the parties to any contract for construction extend the above prescribed limitations by agreement or otherwise.

(g) As used in this section, the term "person" shall mean an individual, corporation, trust, partnership, unincorporated organization, limited liability company, or any other business association or entity.

(h)(1) It is the intent of the General Assembly and the purpose of this subsection to reinstate and to codify the accepted-work doctrine for publicly owned improvements to public property, which was repudiated by the Arkansas Supreme Court in *Suneson v. Holloway Construction Co.*, 337 Ark. 571 (1999).

(2)(A) A contractor who performs the construction or repair of any publicly owned improvement to public real property in substantial compliance with the designs or plans, after a practical acceptance of the completion of the improvement by the person representing the government entity in actual possession or control thereof as proprietor, owner, tenant, or otherwise, shall incur no further liability to third parties by reason of the condition of the work unless contracted otherwise by the parties.

(B) The contractor may be liable for an improvement that is a nuisance per se, or that contains a defect that could not reasonably be

detected on inspection by the proprietor, or that was turned over by the contractor in a manner so negligently defective as to be eminently dangerous to third persons.

History. Acts 1967, No. 42, §§ 1-8; A.S.A. 1947, §§ 37-237 — 37-244; Acts 2001, No. 1119, §§ 1, 2.

A.C.R.C. Notes. Acts 2001, No. 1119, § 3, provided: "This act shall not apply to any case based upon facts which occurred

prior to the effective date of this act." The effective date of Acts 2001, No. 1119, is March 27, 2001.

Amendments. The 2001 amendment, in (g), inserted "trust," "limited liability company" and "or entity"; and added (h).

RESEARCH REFERENCES

ALR. What constitutes "improvement to real property" for purposes of statute of repose or statute of limitations. 122 ALR 5th 1.

Ark. L. Notes. Looney, When Third Means Fourth, Contract Includes Tort, and a Five-Year Statute of Limitation Actually Leaves Only Three Years or Less to File Suit: The Strange Saga of the Arkansas "Statute of Repose" in Construction Cases, 1993 Ark. L. Notes 87.

UALR L.J. Paul, The Law of Construction Bonds in Arkansas: A Review, 9 UALR L.J. 333.

Survey, Contracts, 14 UALR L.J. 329.

Seventeenth Annual Survey of Arkansas Law — Torts, 17 UALR L.J. 453.

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CASE NOTES

ANALYSIS

Constitutionality.

In general.

Construction.

Purpose.

Applicability.

Action barred.

Breach of implied warranty.

Improvement to real property.

Constitutionality.

This section does not grant special privileges or immunities in violation of Art. 2, § 18, of the Arkansas Constitution, as a vital distinction exists between owners or suppliers and those engaged in the professions and occupations of design and building. *Carter v. Hartenstein*, 248 Ark. 1172, 455 S.W.2d 918 (1970), appeal dismissed, 401 U.S. 901, 91 S. Ct. 868, 27 L. Ed. 2d 800 (1971).

This section is not a special law in violation of Art. 5, § 25, or Amendment 14 of the Arkansas Constitution because it is limited to those furnishing design or construction for improvements to real estate. *Carter v. Hartenstein*, 248 Ark. 1172, 455 S.W.2d 918 (1970), appeal dismissed, 401 U.S. 901, 91 S. Ct. 868, 27 L. Ed. 2d 800 (1971).

In General.

Subdivision (b)(1) of this section is a substantive statute. *Brown v. Overhead Door Corp.*, 843 F. Supp. 482 (W.D. Ark. 1994).

Construction.

The phrase "in contract" should be construed in the light of the legislative purpose and the language of the preamble to Act 1967, No. 42 to extend the coverage of this section to all actions which arise out of a construction contract where property damage has allegedly resulted from any deficiency in design, planning, supervision, or observation of construction, or the construction and repair of any improvement to real property. *Okla Homer Smith Furn. Mfg. Co. v. Larson & Wear, Inc.*, 278 Ark. 467, 646 S.W.2d 696 (1983).

The legislature simply made a mistake when it used "third" instead of "fourth" in the phrase "occurred during the third year after the substantial completion" in subdivision (b)(2). *Dooley v. Hot Springs Family YMCA*, 301 Ark. 23, 781 S.W.2d 457 (1989).

There is no exception in subsection (a) for residential property, and the statute does not give the purchaser of residential

property a reasonable length of time to bring suit. *Rogers v. Mallory*, 328 Ark. 116, 941 S.W.2d 421 (1997).

Because this section provided a statute of repose on actions to recover damages caused by a deficiency in the construction of an improvement to real property, and the instant case involved an alleged breach of an indemnity provision in a construction contract, the statute did not apply; if the legislature wants to expand the protection afforded by the statute of repose to include indemnity actions arising from construction work, it may wish to amend the statute. *Ray & Sons Masonry Contrs., Inc. v. United States Fid. & Guar. Co.*, 353 Ark. 201, 114 S.W.3d 189 (2003).

Because a statute of repose is not an affirmative defense, the failure to plead it as an affirmative defense is not a bar to raising the issue on appeal; thus, the court considered the issue on appeal as claimed by a subcontractor. *Ray & Sons Masonry Contrs., Inc. v. United States Fid. & Guar. Co.*, 353 Ark. 201, 114 S.W.3d 189 (2003).

Purpose.

The legislative purpose of this section was to enact a comprehensive statute of limitations protecting persons engaged in the construction industry from being subject to litigation arising from work performed many years prior to the initiation of the lawsuit. *Okla Homer Smith Furn. Mfg. Co. v. Larson & Wear, Inc.*, 278 Ark. 467, 646 S.W.2d 696 (1983).

Applicability.

The manufacturers of mass produced fungible goods do not fall within the protection of subdivision (b)(1) of this section, particularly when the defendant manufacturer is not involved in the installation of the product and had nothing to do with the design of the improvement within which it is installed. *Brown v. Overhead Door Corp.*, 843 F. Supp. 482 (W.D. Ark. 1994).

In a breach of contract action for alleged architectural defects, in which a written contract was involved, § 16-56-111(b) was the applicable statute of limitations; the existence of this section did not extend the statute of limitations under § 16-56-111(b) or otherwise affect its applicability. *Zufari v. Architecture Plus*, 323 Ark. 411, 914 S.W.2d 756 (1996).

Action Barred.

Plaintiff's action in contract was filed

more than five years after substantial completion of subcontractor's work and was barred by this section. *Okla Homer Smith Furn. Mfg. Co. v. Larson & Wear, Inc.*, 278 Ark. 467, 646 S.W.2d 696 (1983).

Suit for damage to shop brought more than five years after shopping center was built was barred by this section. *Elliotte v. Johnson*, 285 Ark. 383, 687 S.W.2d 523 (1985).

In directing the verdict, the trial court properly found no evidence of fraudulent concealment that would have tolled the statute of limitations found in subsection (a) of this section; the homeowner testified that, upon inspecting the house with a realtor prior to purchasing it in 1991, he noticed cracks along mortar joints and in the sheet rock caused by the expanding and contracting soil, and the fact that the homeowner discussed the problem with the builder in 1994 showed that he had sufficient knowledge to commence the running of the statute of limitations. *Curry v. Thornsberry*, 81 Ark. App. 112, 98 S.W.3d 477 (2003).

Trial court properly directed a verdict for home builder because, although the home buyers offered some proof of the defective condition of the home, they offered no evidence to indicate that the builder engaged in some positive act of fraud to toll the statute of limitations; moreover, the buyers knew that the house had defects before they purchased it. *Curry v. Thornsberry*, 354 Ark. 631, 128 S.W.3d 438 (2003).

Where the residence was constructed in 1987, but appellant's suit was not filed until 1995, in the absence of fraudulent concealment of the alleged deficiencies in construction of their home, appellant's suit was barred as of 1992 by the statute of limitations found in subsection (a) of this section and the builder was properly granted a directed verdict. *Curry v. Thornsberry*, 354 Ark. 631, 128 S.W.3d 438 (2003).

Breach of Implied Warranty.

The five-year limit imposed by subsection (a) applies to claims for breach of the implied warranty of habitability of a dwelling even where the alleged breach was not discovered until after the limitations period had run. *Rogers v. Mallory*, 328 Ark. 116, 941 S.W.2d 421 (1997).

There is an implied warranty of fitness

and habitability in the sale of a new house which extends to the subsequent purchasers of the home. *Curry v. Thornsberry*, 354 Ark. 631, 128 S.W.3d 438 (2003).

Improvement to Real Property.

For action for damages resulting from breach of contract when equipment failed, the equipment constituted an improvement to real property although not bolted or otherwise attached to the building where it was interconnected with other parts of machinery and equipment of the plaintiff and therefore the limitation of this section governed. *Cherokee Carpet Mills, Inc. v. Manly Jail Works, Inc.*, 257 Ark. 1041, 521 S.W.2d 528 (1975).

Subsection (a) clearly establishes a maximum five-year period within which an injured party can bring suit against a person who deficiently constructs or repairs an improvement to real property which commences after the substantial completion of the improvement, but, in

bringing such a suit, the injured party must still bring the action within the statute of limitations for that type of cause of action. If the breach or injury occurs immediately after the completion of the improvement, the injured party must still comply with § 16-56-105(3) and bring his action within three years from when the breach occurs but not later than the five-year period provided in subsection (a). *East Poinsett County Sch. Dist. No. 14 v. Union Std. Ins. Co.*, 304 Ark. 32, 800 S.W.2d 415 (1990).

Retaining wall was an "improvement." *65th Ctr., Inc. v. Copeland*, 308 Ark. 456, 825 S.W.2d 574 (1992).

Cited: *Carter v. Hartenstein*, 248 Ark. 1172, 455 S.W.2d 918 (1970), appeal dismissed, 401 U.S. 901, 91 S. Ct. 868, 27 L. Ed. 2d 800 (1971); *City of Hot Springs v. National Sur. Co.*, 258 Ark. 1009, 531 S.W.2d 8 (1975); *Gay v. Rabon*, 280 Ark. 5, 652 S.W.2d 836 (1983).

16-56-113. Bonds of executors and administrators.

Actions on the bonds of executors and administrators shall be commenced within eight (8) years after the cause of action shall accrue, and not afterward.

History. Acts 1844, § 1, p. 24; C. & M. Dig., § 6958; Pope's Dig., § 8936; A.S.A. 1947, § 37-211.

CASE NOTES

ANALYSIS

Accrual of action.
Fraud.

Accrual of Action.

The statute does not begin to run against a cause of action on an administrator's bond until there is a final judgment in the probate court and an order to pay creditors which is violated by the administrator. *Hall v. Cole*, 71 Ark. 601, 76 S.W. 1076 (1903).

Fraud.

Proceeding by collateral heirs, to set aside judgment secured by alleged sole heir against estate was barred where it was filed more than eight years after rendition of judgment, since alleged fraud in securing of judgment did not toll limitation period. *Williams v. Purdy*, 223 Ark. 275, 265 S.W.2d 534 (1954).

Cited: *Hanf v. Whittington*, 42 Ark. 491 (1883); *Meyer v. Fidelity & Deposit Co.*, 197 Ark. 418, 122 S.W.2d 586 (1938).

16-56-114. Judgments and decrees.

Actions on all judgments and decrees shall be commenced within ten (10) years after cause of action shall accrue, and not afterward.

History. Acts 1844, § 1, p. 24; C. & M. Dig., § 6959; Pope's Dig., § 8937; A.S.A. 1947, § 37-212.

Cross References. Executions on

judgments in justice of the peace courts limited to five years, § 16-19-1002.

Ten years to bring scire facias to revive judgment, § 16-65-501.

CASE NOTES

ANALYSIS

In general.

Accrual of action.

Child support.

Criminal proceedings.

Estate administration.

Foreign judgments.

Justices of peace.

Municipal courts.

Property settlement agreement.

Public administrator.

Suspension of statute.

Worker's compensation.

In General.

The defense of the statute of limitations is a valid or meritorious one such as will support the vacation of a judgment. *Berringer v. Stevens*, 145 Ark. 293, 225 S.W. 14 (1920).

Judgment lien expires within three years after its rendition, unless revived, but judgment creditor may issue an execution on the judgment at any time within ten years after its rendition. *Bird v. Kitchens*, 215 Ark. 609, 221 S.W.2d 795, cert. denied, 338 U.S. 892, 70 S. Ct. 241, 94 L. Ed. 548 (1949).

This section does not provide for revival of the statute of limitations for actions on a judgment by a subsequent acknowledgment of debt. *Malone v. Malone*, 338 Ark. 20, 991 S.W.2d 546 (1999).

Accrual of Action.

The cause of action accrues upon the rendition of the judgment, but the issuance of process or payment on a judgment will toll the statute and form a new period from which it will run. *Koontz v. La Dow*, 133 Ark. 523, 202 S.W. 686 (1918).

The date of payment on a judgment is the time from which a new period of life for ten years begins to run. *Pepin v. Hoover*, 205 Ark. 251, 168 S.W.2d 390 (1943).

A cause of action on a judgment accrues on the date the judgment is rendered. *A. Karcher Candy Co. v. Hopkins*, 211 Ark. 810, 202 S.W.2d 588 (1947).

Child Support.

This section does not apply to the recov-

ery of delinquent child-support payments since the order for child-support is not a final decree. *Brun v. Rembert*, 227 Ark. 241, 297 S.W.2d 940 (1957).

In actions for child-support arrearages, the limitation period found in § 9-14-236 applies, not the ten-year statute in this section. *Cole v. Harris*, 330 Ark. 420, 953 S.W.2d 586 (1997).

While § 9-14-234 provides that child support installments payable through the court registry become final judgments as they accrue, this section's general ten-year statute of limitations does not apply to actions to collect such arrearages; instead, the limitations period found at § 9-14-236(c) governs. *Sanderson v. Harris*, 330 Ark. 741, 957 S.W.2d 685 (1997).

Enforcement of a judgment for accrued child support arrearages was barred where the judgment was rendered in July, 1985, the only proven payment on the judgment was a garnishment in September, 1985, and no action was commenced within 10 years from that date. *Malone v. Malone*, 338 Ark. 20, 991 S.W.2d 546 (1999).

Criminal Proceedings.

This statute has no relation to criminal proceedings. *Stocks v. State*, 171 Ark. 835, 286 S.W. 975 (1926).

Estate Administration.

Probate allowances are within this statute; while the statute does not operate to bar a judgment during the course of administration, it commences running when the administrator is discharged. *Brown v. Hanauer*, 48 Ark. 277, 3 S.W. 27 (1886).

Statute does not begin to run against claim against estate until administration has been closed. *Tellier v. Darragh*, 220 Ark. 363, 247 S.W.2d 960 (1952).

Even though a claim against an estate may be considered a judgment and the ten-year statute govern, where administratrix sold real property of estate to herself subject to lien for attorney's fee, there was a waiver of the claim against the estate in favor of the contractual lien in

the deed and rights were barred by delay of eight years. *Tellier v. Darragh*, 220 Ark. 363, 247 S.W.2d 960 (1952).

Foreign Judgments.

Even though Arkansas provides a ten-year period for the enforcement of all judgments which also applies to judgments revived in this state, where a judgment was revived in Illinois under that state's 20-year statute of limitations, and registration and enforcement were then sought in Arkansas, this state would give full faith and credit to the validly revived Illinois judgment. *Durham v. Arkansas Dep't of Human Services/Child Support Enforcement Unit*, 322 Ark. 789, 912 S.W.2d 412 (1995).

Trial court properly denied property owners' motion to quash judgment holder's motion to execute a Missouri judgment by forcing the sale of Arkansas real estate; the Arkansas statute of limitations applied because the Missouri statute of limitations, Mo. Ann. Stat. § 516.350, was procedural in nature as it only worked to extinguish the judgment holders' remedy and the action was timely under the Arkansas statute. *Middleton v. Lockhart*, 355 Ark. 434, 139 S.W.3d 500 (2003).

Justices of Peace.

This section applies to judgments of justices of the peace; the provision of § 16-19-1002 against issuing execution after five years does not prevent suits on the judgment nor bar recovery. *Hicks v. Brown*, 38 Ark. 469 (1881); *Trammell v. Anderson*, 52 Ark. 176, 12 S.W. 328 (1889).

Municipal Courts.

This section applies to judgments of municipal courts. *A. Karcher Candy Co. v. Hopkins*, 211 Ark. 810, 202 S.W.2d 588 (1947).

Property Settlement Agreement.

Where the property settlement agreement was an independent contract that was incorporated into the court decree, it did not merge into the decree and was, therefore, subject to the five-year statute of limitations in § 16-56-111, and not the ten-year limitations period under this section. *Meadors v. Meadors*, 58 Ark. App. 96, 946 S.W.2d 724 (1997).

Public Administrator.

Where final settlement as public administrator was approved by the probate

court, a suit thereon filed seven years later was not barred by the ten year statute although the sheriff went out of office more than ten years before suit was filed. *Elmore v. Bishop*, 184 Ark. 243, 42 S.W.2d 399 (1931).

Since creditor could enforce his judgment with a remedy of a resulting trust, the district court erred in finding that his claim was time-barred by the Arkansas Fraudulent Transfers Act, § 4-59-201 et seq.; the allegations were sufficient to argue that a resulting trust was formed, and the creditor, who was entitled to step into the debtor's shoes, timely filed his claim within the 10 years for enforcing a judgment against the defendant, the trustee/title holder of real property held for the benefit of the debtor. *Imperato v. McMinin*, 406 F.3d 987 (8th Cir. 2005).

Suspension of Statute.

While a judgment is enjoined, a statute does not run, and intermediate executions and payments form new points for the running of the statute. *Lindsay v. Merrill*, 36 Ark. 545 (1880).

Process may be issued at any time before the enforcement of a judgment is barred, and a break in the running of the statute of limitations will constitute the commencement of a new period not only for an action to enforce the judgment but for the issuance of process. *Koontz v. La Dow*, 133 Ark. 523, 202 S.W. 686 (1918).

Worker's Compensation.

While a two-year statute of limitations applied to the filing of a claim for workers' compensation benefits, pursuant to § 11-9-702(a)(1), that limitations period did not apply to bar the employee's claim against the employer where the employee was not filing a claim for workers' compensation benefits, but instead was seeking to enforce an Illinois judgment he had already received based on an injury he sustained in Illinois while working for the employer; in that case, this section's 10-year limitations period for enforcement of judgments applied. *Dodson v. Taylor*, 346 Ark. 443, 57 S.W.3d 710 (2001).

Cited: *A. Baldwin & Co. v. Williams*, 74 Ark. 316, 86 S.W. 423 (1905); *Martin v. H.T. Simon, Gregory & Co.*, 86 Ark. 280, 110 S.W. 1046 (1908); *Koontz v. La Dow*, 133 Ark. 523, 202 S.W. 686 (1918); *Epperson v. Singleton*, 247 Ark. 1006, 449 S.W.2d 203 (1970).

16-56-115. Limitation of actions not otherwise provided for.

All actions not included in §§ 16-56-104, 16-56-105, 16-56-108, and 16-56-109 shall be commenced within five (5) years after the cause of action has accrued.

History. Rev. Stat., ch. 91, § 11; C. & M. Dig., § 6960; Pope's Dig., § 8938; A.S.A. 1947, § 37-213.

CASE NOTES**ANALYSIS**

Actions on accounts.
Applicability.
Attorney's lien.
Change in limitations.
Child support.
Civil rights.
Contracts.
Decedent's estate.
Local governments.
Tort.
Unfair practices act.

Actions on Accounts.

An action to surcharge the account of a treasurer is barred in five years. *Sims v. Craig*, 171 Ark. 492, 286 S.W. 867 (1926).

Applicability.

This section's five-year statute of limitations is applicable to those child support payments due prior to the effective date of §§ 9-14-236 and 16-56-129 (repealed), and the new ten-year statute of limitations found in those sections is applicable to payments accruing after the effective date of those sections. *Sullivan v. Edens*, 304 Ark. 133, 801 S.W.2d 32 (1990).

Attorney's Lien.

Lien of attorney on land sold by estate could not be asserted after eight years. *Tellier v. Darragh*, 220 Ark. 363, 247 S.W.2d 960 (1952).

Change in limitations.

There is no constitutional impediment, except in title to property cases, to increasing the length of a limitation period and making the increase retroactive to cover claims already in existence; however, the General Assembly may not expand a limitation period so as to revive a claim already barred. *Chunn v. D'Agostino*, 312 Ark. 141, 847 S.W.2d 699 (1993).

Child Support.

Action to recover delinquent child support payments is governed by this section. *Brun v. Rembert*, 227 Ark. 241, 297 S.W.2d 940 (1957); *Johnson v. Lilly*, 308 Ark. 201, 823 S.W.2d 883 (1992).

A father's legal obligation to support his minor children can be enforced against the father unless barred by the five-year statute of limitations. *Brown v. Brown*, 233 Ark. 422, 345 S.W.2d 27 (1961).

Where mother brought action for support of illegitimate child against putative father, more than five years after the child's birth, it was error to grant the father summary judgment, since the child is the real party in interest and should thus not be barred by the mother's failure to bring the action. *Dozier v. Veasley*, 272 Ark. 210, 613 S.W.2d 93 (1981).

Section 9-14-236 applies retroactively to expand the statute of limitations for causes of action for delinquent child-support payments not barred on the date of the section's enactment. *Branch v. Carter*, 326 Ark. 748, 933 S.W.2d 806 (1996).

Civil Rights.

In an action brought by an Arkansas resident against Arkansas police officers for alleged deprivation of civil rights, either the Arkansas three-year statute of limitations for actions founded on contract or liability, which has been construed to cover liability created by statute, or the five-year general statute of limitations was applicable, and since the action was instituted within the statutory period of both statutes, it was timely. *Glasscoe v. Howell*, 431 F.2d 863 (8th Cir. 1970).

Contracts.

Five-year statute applies to action to recover funds paid under a void contract with an improvement district. *Core v. McWilliams Co.*, 175 Ark. 112, 298 S.W. 879 (1927).

Landowners and taxpayers in an action to recover funds alleged to have been paid defendant on a void contract and converted to its own use were permitted to recover under this section. *Core v. McWilliams Co.*, 175 Ark. 112, 298 S.W. 879 (1927).

Where alleged fraud in the sale of stock could have been discovered by the exercise of reasonable diligence at time stockholder executed written guarantee as additional security to deed of trust on lands of corporation, and this occurred more than five years prior to institution of action for fraud, action was barred by this statute. *Kahn v. Hardy*, 201 Ark. 252, 144 S.W.2d 725 (1940).

Action filed for breach of warranty a few days prior to date of deed was timely, the warranty being breached as of the date of conveyance. *Wood v. Setliff*, 229 Ark. 1007, 320 S.W.2d 655 (1959).

Where grantee sued grantor for breach of warranty, the property having been originally granted more than five years prior to commencement of suit, action would be barred by the statute of limitations. *Wood v. Setliff*, 229 Ark. 1007, 320 S.W.2d 655 (1959).

The statute of limitations regarding an action to recover real or personal property did not begin to run, where evidence sufficient to find that trustee held corpus of trust under new trust with remainderman's consent. *McDermott v. McAdams*, 268 Ark. 1031, 598 S.W.2d 427 (Ct. App. 1980), *aff'd*, 273 Ark. 20, 616 S.W.2d 476 (1981).

Decedent's Estate.

An order of the probate court erroneously precluding an heir from participation in an estate is a conversion, and the statute of limitations of five years ran against the heir as soon as the distribution was made and was not arrested by reason of his nonresidence. *Hill v. Wade*, 155 Ark. 490, 244 S.W. 743 (1922).

Heirs whose names were omitted from a will have five years in which to bring a suit to recover their share of an estate. *James v. Halmich*, 186 Ark. 1053, 57 S.W.2d 829 (1933).

This section does not apply to suit to probate will. *Hudson v. Hudson*, 219 Ark. 211, 242 S.W.2d 154 (1951).

Proceeding by collateral heirs, who were nonresidents, to set aside judgment se-

cured by alleged sole heir against estate was barred where it was filed 18 years after rendition of judgment, since alleged fraud in securing of judgment did not toll limitation period, as there were no positive acts of fraudulent concealment, and plaintiffs could have obtained information by checking records of estate. *Williams v. Purdy*, 223 Ark. 275, 265 S.W.2d 534 (1954).

Where landlord held landlord's lien and mortgages as security, the court held that none of the indebtedness of decedent to landlord was barred by the statute of limitations where the limitation had not run before decedent's death. *Goins v. Sneed*, 229 Ark. 550, 317 S.W.2d 269 (1958).

Pretermitted children had five years from the date of distribution under their father's will to bring an action against the devisee under the will for partition of the devised property. *Negovanov v. Wensko*, 248 Ark. 1109, 455 S.W.2d 929 (1970).

Heir to decedent father's estate who at time of probate was presumed dead was precluded by statute of limitations from attacking the determination of heirship. *McBroom v. Clark*, 252 Ark. 372, 480 S.W.2d 947 (1972).

There is no reason for a requirement that a petition for the determination of heirship be filed within five years or any other specified time after the death of the person whose heirs are to be ascertained. *Bryant v. Lemmons*, 269 Ark. 5, 598 S.W.2d 79 (1980).

Commitment of fraud in administration of estate tolled the statute of limitations. *Walters v. Lewis*, 276 Ark. 286, 634 S.W.2d 129 (1982).

Local Governments.

The statute of limitations can be pleaded by a county. *Gaines v. Hot Springs County*, 39 Ark. 262 (1882).

Statute does not apply to actions against board of education for interest belonging to county school fund. *County Bd. of Educ. v. Morgan*, 182 Ark. 1110, 34 S.W.2d 1063 (1931), overruled on other grounds, *Hartwick v. Thorne*, 300 Ark. 502, 780 S.W.2d 531 (1989).

The three year, and not the five year, statute of limitations is applicable to suit against county treasurer. *Fidelity & Cas. Co. v. State*, 197 Ark. 1027, 126 S.W.2d 293 (1939).

In suit against county treasurer, statute of limitations commences to run from the date of the settlement. *Fidelity & Cas. Co. v. State*, 197 Ark. 1027, 126 S.W.2d 293 (1939).

In suit against county treasurer, for money paid out on void warrants and falsely credited in her account, the statute of limitations commences to run from the date of the settlement. *Fidelity & Cas. Co. v. State*, 197 Ark. 1027, 126 S.W.2d 293 (1939).

The municipality is a creature of the state; in this case warranty in municipal land transfer was breached as of the date of conveyance of the property. *Wood v. Setliff*, 229 Ark. 1007, 320 S.W.2d 655 (1959).

Tort.

A civil action for seduction sounds in tort and may be brought within five years. *Darnell v. Lea*, 162 Ark. 516, 258 S.W. 363 (1924).

The five year statute of limitations provided for in this section applies to an action for alienation of affections. *Gibson v. Gibson*, 240 Ark. 827, 402 S.W.2d 647 (1966). (Case was decided prior to the 1967 amendment of § 16-56-104.)

In suit for severe emotional distress upon the plaintiffs, the three-year statute of limitations under § 16-56-105 applied, and the five-year statute of limitations under this section did not apply; thus, suit filed four years after distress was inflicted was time-barred. *Orlando v. Alamo*, 646 F.2d 1288 (8th Cir. 1981).

Unfair Practices Act.

The Arkansas Unfair Practices Act contains no limitation period, which results in the application of the general catch-all five-year statute found in this section. *Jackson v. Swift-Eckrich*, 830 F. Supp. 486 (W.D. Ark. 1993), *aff'd sub nom. Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995).

Cited: *Breining v. Lippincott*, 125 Ark. 77, 187 S.W. 915 (1916); *England v. Hughes*, 141 Ark. 235, 217 S.W. 13 (1919); *Scroggin Farms Corp. v. McFadden*, 165 F.2d 10 (8th Cir. 1948); *Wheeler v. Wallingsford*, 229 Ark. 576, 317 S.W.2d 153 (1958); *Nelson v. Eckert*, 231 Ark. 348, 329 S.W.2d 426 (1959); *Wilson v. Wilson*, 231 Ark. 416, 329 S.W.2d 557 (1959); *Tollett v. Mashburn*, 183 F. Supp. 120 (W.D. Ark. 1960), *aff'd*, 291 F.2d 89 (8th Cir. 1961); *Wilder v. Garner*, 235 Ark. 400, 360 S.W.2d 192 (1962); *Lane v. Graves*, 525 F.2d 311 (8th Cir. 1975); *Bankston v. Davis*, 262 Ark. 635, 559 S.W.2d 714 (1978); *Russ v. Ratliff*, 578 F.2d 221 (8th Cir. 1978); *Winston v. Robinson*, 270 Ark. 996, 606 S.W.2d 757 (1980); *Pruitt v. Pruitt*, 271 Ark. 404, 609 S.W.2d 84 (1980); *Ragland v. Travenol Labs., Inc.*, 286 Ark. 33, 689 S.W.2d 349 (1985); *Coast-to-Coast Stores, Inc. v. Citizens Bank*, 676 F. Supp. 923 (E.D. Ark. 1987); *Carroll County v. Eureka Springs Sch. Dist. # 21*, 292 Ark. 151, 729 S.W.2d 1 (1987); *F & M Bank v. Hamilton Hotel Partners Ltd. Partnership*, 702 F. Supp. 1417 (W.D. Ark. 1988); *Arkansas Office of Child Support Enforcement v. House*, 320 Ark. 423, 897 S.W.2d 565 (1995).

16-56-116. Persons under disabilities at time of accrual of action.

(a) If any person entitled to bring any action under any law of this state is under twenty-one (21) years of age or insane at the time of the accrual of the cause of action, that person may bring the action within three (3) years next after attaining full age, or within three (3) years next after the disability is removed.

(b) No person shall avail himself or herself of any disability unless the disability existed at the time the right of action accrued.

(c) When two (2) or more disabilities are existing at the time the right of action or entry accrued, the limitation prescribed shall not attach until all the disabilities are removed.

History. Rev. Stat., ch. 91, §§ 25, 27; Acts 1844, § 2, p. 24; 1899, No. 123, § 1, p. 199; C. & M. Dig., §§ 6961, 6973, 6975; Pope's Dig., §§ 8939, 8951, 8953; A.S.A.

1947, §§ 37-224 — 37-226; Acts 1999, No. 18, § 1.

Publisher's Notes. Subsection (a) of this section may be superseded as to infants by § 9-25-101, which provides that persons of the age of eighteen (18) years

shall be considered to have reached the age of majority for all purposes except that of purchasing alcoholic beverages.

Cross References. Civil actions based on sexual abuse, § 16-56-130.

RESEARCH REFERENCES

ALR. Effect of appointment of legal representative for person under mental disability on running of state statute of limitations against such person. 111 ALR 5th 159.

Effect of appointment of legal representative for minor on running of state statute of limitations against minor.

CASE NOTES

ANALYSIS

In general.
Applicability.
Accrual of action.
Adoption.
Insanity.
Minority.
—Burden of proof.
—Homesteads.

In General.

Where the statute begins to run during the life of the deviser, no disability in the devisee will stop it. *Bozeman v. Browning*, 31 Ark. 364 (1876).

The rule with respect to infants under this section is equally applicable to incompetents. *Mason v. Sorrell*, 260 Ark. 27, 551 S.W.2d 184 (1976).

Attorneys were not negligent in failing to timely refile client's medical malpractice claim within the one-year time period allowed for refiling a claim under this section, where the law concerning timely refiling of a complaint after taking a non-suit had not been settled. *Pugh v. Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997).

Applicability.

This section is not applicable to the betterment statute, which allows recovery of mesne profits for three years and contains no exception in favor of infants. *Brown v. Nelms*, 86 Ark. 368, 112 S.W. 373 (1908).

This section does not apply to the right under § 14-86-1503 to redeem land from tax sale. *Gamble v. Philips*, 107 Ark. 561, 156 S.W. 177 (1913).

This section does not apply in an action

for wrongful death. *Anthony v. St. Louis, I.M. & S. Ry.*, 108 Ark. 219, 157 S.W. 394 (1913).

The limitation of time fixed by a wrongful death statute is a limitation on the right of action and is an essential element of the right to sue; therefore, the general savings clause provision has no application to wrongful death actions. *Sandusky v. First Elec. Coop.*, 266 Ark. 588, 587 S.W.2d 37 (1979).

This section applies only to action at common law and therefore does not operate to toll the statute of limitations for wrongful death actions, which always have been considered purely statutory. *Crawford v. Martin Marietta Corp.*, 622 F.2d 339 (8th Cir. 1980).

This section applied to a suit for personal injuries brought by parents on behalf of their minor son, under a theory of breach of implied warranty of merchantability; that cause of action has its roots in the common law, even though it has been changed by the Uniform Commercial Code. *Follette v. Wal-Mart Stores, Inc.*, 41 F.3d 1234 (8th Cir. 1994), *supp. op. on reh'g*, 47 F.3d 311 (8th Cir. 1995).

A suit by a minor's guardian brought in her capacity as administratrix of the estate of the decedent is not protected by the provisions of subsection (a). *Morrison v. Jennings*, 328 Ark. 278, 943 S.W.2d 559 (1997).

The two-year statute of limitations and the tolling provision of § 16-114-203 supersede the three-year period that § 16-56-116 allows after a disability is removed for persons insane at the time the right of action accrued. *Smith v. Diversicare Leas-*

ing Corp. of Am., 65 Ark. App. 138, 985 S.W.2d 749 (1999).

The repealer clause added to this section does not have the effect of repealing the specific savings statute enacted for minor children in § 16-114-203 of the Medical Malpractice Act. *Shelton v. Fiser*, 340 Ark. 89, 8 S.W.3d 557 (2000).

Wrongful death action filed against healthcare providers by a decedent's parents was void ab initio where the decedent had no personal representative and the complaint failed to include as a plaintiff the decedent's half-brother; hence, this section did not apply to allow the parents to add the half-brother after the limitations period had run. *Andrews v. Air Evac EMS, Inc.*, 86 Ark. App. 161, 170 S.W.3d 303 (2004).

Accrual of Action.

Taking an appeal from a judgment confirming the settlement of a guardian is barred in one year and does not constitute the bringing of an action within this section. *Nelson v. Cowling*, 89 Ark. 334, 116 S.W. 890 (1909).

This statute did not bar action by ward against guardian for an accounting more than three years after attaining majority, where guardian had not been discharged. *Young v. Young*, 201 Ark. 984, 147 S.W.2d 736 (1941).

The running of the statute was not tolled by the fact that plaintiff was confined outside the state because he was not so confined when his cause of action accrued. *Brown v. United States*, 342 F. Supp. 987 (E.D. Ark. 1972), modified on other grounds, 486 F.2d 284 (8th Cir. 1973).

Adoption.

The one-year statute of limitations in § 9-9-216(b)(1) provides a special procedure which cannot be annulled by ARCP 41(a) or this section, which allows an action dismissed without prejudice to be refiled within one year of the dismissal. In re *Martindale*, 327 Ark. 685, 940 S.W.2d 491 (1997).

Insanity.

Action by next friend to cancel deed executed seven years prior thereto was barred under evidence establishing that grantor for more than three years had not been incompetent to such an extent as to justify holding he did not have capacity to

reason in respect to business matters and to appreciate their significance. *Waggoner v. Atkins*, 204 Ark. 264, 162 S.W.2d 55 (1942).

The right of an an insane person to redeem her property from tax sale is not lost by lapse of statutory time for redemption. *Schuman v. Westbrook*, 207 Ark. 495, 181 S.W.2d 470 (1944).

Where guardian of a mental incompetent sued to set aside a deed executed by the incompetent, guardian was not guilty of laches in view of the three year saving clause of this section. *Zini v. First Nat'l Bank*, 228 Ark. 325, 307 S.W.2d 874 (1957).

The statute of limitations on a personal injury action did not run against an incompetent even though a guardian of his estate had been appointed prior to accrual of the cause of action. *Mason v. Sorrell*, 260 Ark. 27, 551 S.W.2d 184 (1976).

When a person, by reason of the injury sustained, is incapable of managing his or her personal affairs, that individual may be regarded or classified as incompetent or "insane." *Phillips v. Sugrue*, 800 F. Supp. 789 (E.D. Ark. 1992).

Where it was alleged that defendant intentionally took improper sexual liberties with plaintiff and indecently fondled her against her will and without her consent, it appeared likely that plaintiff may have sustained a disability that brought her within the provisions of this statute, adequate to raise a genuine issue of fact as to plaintiff's incompetency at the time of the accrual of the cause of action and as to when, if at all, the disability was removed. *Phillips v. Sugrue*, 800 F. Supp. 789 (E.D. Ark. 1992).

Minority.

A female attains full age at 18 years. *Brake v. Sides*, 95 Ark. 74, 128 S.W. 572 (1910); *Shapard v. Mixon*, 122 Ark. 530, 184 S.W. 399 (1916) (decided prior to 1975 amendment of § 9-25-101).

Action for seduction of an infant may be brought within three years after her majority though an action for same cause had been brought and dismissed for want of prosecution during her infancy. *Darnell v. Lea*, 162 Ark. 516, 258 S.W. 363 (1924).

Infant wards who brought suit within three years after majority were not barred from relief under this section. *Wasson v. Treece*, 189 Ark. 728, 75 S.W.2d 71 (1934).

Decree determining validity of title based on tax sale was valid and binding where minor defendants affected by it took no steps to void it within three years after having reached their majority. *Canon v. Price*, 202 Ark. 464, 150 S.W.2d 755 (1941).

In action by heirs for cancellation of deed and an accounting in which two heirs were alleged to be minors, plea of limitations set up by defendant in motion for judgment on pleadings could not be considered. *Story v. Cheatham*, 217 Ark. 193, 229 S.W.2d 121 (1950).

Where plaintiff was under age of majority at the time his cause of action for treble damages under § 18-60-102 arose, this section rather than § 16-56-108 is controlling. *Callaway v. Perdue*, 238 Ark. 652, 385 S.W.2d 4 (1964).

A minor and his mother could maintain tort actions against the estate of decedent after the expiration of the statute of non-claim when there was in force a policy of liability insurance on decedent's vehicle which policy has been depleted through the use of a bill of interpleader in the federal district court. *Johnson v. Poore*, 266 Ark. 601, 587 S.W.2d 44 (1979).

Where a wrongful death action was not filed by the minor children of a man killed in a construction accident until 15 years after the accident, the statute of limitations for the wrongful death action was not tolled during the minority of the plaintiffs and thus the action was barred by the three-year statute of limitations. *Crawford v. Martin Marietta Corp.*, 622 F.2d 339 (8th Cir. 1980).

Section 4-86-102 which governs causes of action based on strict liability creates a new right that was not available at common law, but does not contain a specific period of limitation; such actions are governed by the general statute of limitations applicable to all products liability cases in § 16-116-103. Therefore, this section operates to extend the time for minors to file

a products liability action brought on a strict liability theory. *Harris v. Standardized San. Sys.*, 658 F. Supp. 438 (W.D. Ark. 1987), rev'd on other grounds, 856 F.2d 64 (8th Cir. 1988).

Probate section giving an illegitimate child 180 days to file a claim creates a new right, and the right is created for only 180 days. *Boatman v. Dawkins*, 294 Ark. 421, 743 S.W.2d 800 (1988).

Where child did not fall within either of the two exceptions for a minor's cause of action under § 16-114-203(c), the complaint brought on his behalf was barred by the two-year statute of limitations in this section. *Shelton v. Fiser*, 340 Ark. 89, 8 S.W.3d 557 (2000).

—Burden of Proof.

Burden is on plaintiff to prove bringing of suit within three years after attaining his majority. *Yell v. Lane*, 41 Ark. 53 (1883).

—Homesteads.

That the homestead of a minor will deteriorate in value and will be insufficient to satisfy the claims against the estate if the right to sell is postponed until the minor reaches his majority and that judgments against the estate will be barred by the statute of limitations before that time constitute no valid reason for the sale of land while a minor's right of homestead in it exists. *Henry v. Dollin*, 195 Ark. 607, 113 S.W.2d 97 (1938).

This statute was held not to affect rule that when one dies seized of a homestead leaving as heirs minor children they have two separate and distinct estates in the land, existing at the same time and incapable of merger. *Kitchens v. Wheeler*, 200 Ark. 671, 141 S.W.2d 34 (1940).

Cited: *Frakes v. Hunt*, 266 Ark. 171, 583 S.W.2d 497 (1979); *Eddleman v. Estate of Farmer*, 294 Ark. 8, 740 S.W.2d 141 (1987); *Linder v. Howard*, 296 Ark. 414, 757 S.W.2d 549 (1988).

16-56-117. Death of person entitled to sue or of a party.

(a) If any person entitled to bring any action specified in this act dies before the expiration of the time limited for the commencement of the suit, and if the cause of action survives to his or her representatives, then his or her executors or administrators may commence the suit, after the expiration of such time and within one (1) year after his or her death, but not after that period.

(b)(1) If any action has been commenced within the times respectively prescribed in the provisions of this act, and the defendant in the suit dies before judgment and the right of action survives against the representatives of the defendant, the plaintiff may commence a new action against the heirs, executors, or administrators of the defendant, as the case may require, within one (1) year after the defendant's death.

(2) If no executor or administrator is appointed within that time, within one (1) year after the letters testamentary or of administration have been granted.

(c)(1) When an action commenced within the time prescribed by law abates by reason of the death of the plaintiff, the plaintiff's executor or administrator may commence a new action within one (1) year after the death of the plaintiff if the right of action survives to his or her representatives.

(2) If any action commenced by an executor or administrator abates by the death of the plaintiff, a new action may be commenced by the administrator of the same estate at any time within one (1) year after the abatement.

History. Rev. Stat., ch. 91, §§ 19, 22, 23; C. & M. Dig., §§ 6968, 6970, 6971; Pope's Dig., §§ 8946, 8948, 8949; A.S.A. 1947, §§ 37-219 — 37-221.

Meaning of "this act". See note to § 16-56-102.

Cross References. Revivor of actions, §§ 16-62-107, 16-62-108.

CASE NOTES

ANALYSIS

Defendant's death.
Plaintiff's death.

Defendant's Death.

When the statute commenced to run in creditor's lifetime, it did not stop upon his death until administration was granted on his estate. *Brown v. Merrick & Fenno*, 16 Ark. 612 (1855); *Whipple v. Johnson*, 66 Ark. 204, 49 S.W. 827 (1899); *Salinger v. Black*, 68 Ark. 449, 60 S.W. 229 (1900).

Plaintiff's Death.

Where after death of plaintiff, suit in state court was not revived under the provisions of § 16-62-108 and was dismissed, administrator of plaintiff could not bring a new action in federal court after one year had elapsed. *Robison v. Jones*, 261 F.2d 584 (8th Cir. 1958).

Cited: *McGraw v. Miller*, 184 Ark. 916, 44 S.W.2d 366 (1932); *Williams v. Purdy*, 223 Ark. 275, 265 S.W.2d 534 (1954).

16-56-118. Suspension of limitations — Persons in the armed forces.

(a) The statutes of limitations in this state are suspended so far as those statutes affect the claim or cause of action of a person in the armed forces of the United States during the existence of a state of war between the United States and any other nation, and for six (6) months thereafter.

(b) Any person in the armed forces of the United States during the existence of a state of war between the United States and any other nation may, at any time within one (1) year after the end of the state of war and six (6) months thereafter, maintain a suit for the collection of any debt or the recovery of any real or personal property to which the

person may be entitled if the statute of limitations had not run against the action prior to the person's entry into the armed forces of the United States.

History. Acts 1943, No. 159, §§ 1, 2;
A.S.A. 1947, §§ 37-227, 37-228.

16-56-119. Commencement of suit stayed by injunction — Effect.

Whenever the commencement of any suit is stayed by an injunction of any court of equity, the time during which the injunction shall be in force shall not be deemed any portion of the time in this act limited for the commencement of the suit.

History. Rev. Stat., ch. 91, § 24; C. & M. Dig., § 6972; Pope's Dig., § 8950; A.S.A. 1947, § 37-223. **Meaning of "this act".** See note to § 16-56-102.

16-56-120. Prevention of commencement of action by party.

If any person, by leaving the county, absconding, or concealing himself, or by any other improper act of his own, prevents the commencement of any action specified in this act, the action may be commenced within the times respectively limited after the commencement of the action shall have ceased to be so prevented.

History. Rev. Stat., ch. 91, § 26; C. & M. Dig., § 6974; Pope's Dig., § 8952; A.S.A. 1947, § 37-229. **Meaning of "this act".** See note to § 16-56-102.

CASE NOTES

ANALYSIS

In general.
Absconding.
Burden of proof.
Cause of action concealed.
Improper act.

In General.

Under this section the inability of the plaintiff to sue in consequence of any act of the defendant mentioned in this section must exist at the time the cause of action accrues. *Denton v. Brownlee*, *Homer & Co.*, 24 Ark. 556 (1867); *Richardson v. Cogswell*, 47 Ark. 170, 1 S.W. 51 (1886); *Keith v. Hiner*, 63 Ark. 244, 38 S.W. 13 (1896).

Absconding.

A foreign corporation which neglects to designate an agent upon whom process may be served is not an absconding debtor. *Rachels v. Stecher Cooperage Works*, 95 Ark. 6, 128 S.W. 348 (1910).

A guarantor of a note who left the state openly and with knowledge of the officers of a bank holding the note was not an absconding debtor. *Smith v. Farmers & Merchants Bank*, 183 Ark. 235, 35 S.W.2d 347 (1931).

Evidence held to show debtor who left state was not an absconder within the meaning of this statute. *Keck v. Pickens*, 207 Ark. 757, 182 S.W.2d 873 (1944).

Burden of Proof.

Although this section allows for tolling of the statute of limitations when the defendant has concealed himself or by other improper action has prevented the commencement of a cause of action, where the plaintiff made nothing more than cursory allegations to this effect, and has shown nothing by way of proof that the defendant's misconduct prevented her from proceeding with her suit, the District Court properly dismissed her 42 U.S.C.

§ 1983 action. *Roberts v. Dillon*, 15 F.3d 113 (8th Cir. 1994).

Cause of Action Concealed.

Fraud suspends the statute, but the suspension is arrested as soon as the fraud is discovered by the party having the right of action, or which could have been discovered by the party unless he negligently failed to do so; statute does not run against a trust until there is a disclaimer of the trust brought home to the beneficiary. *McGaughey v. Brown*, 46 Ark. 25 (1885); *Woodard v. Jagers*, 48 Ark. 248, 2 S.W. 851 (1886); *Wren v. Followell*, 52 Ark. 76, 12 S.W. 155 (1889); *French v. Watson*, 52 Ark. 168, 12 S.W. 328 (1889); *Jacoway v. Hall*, 67 Ark. 340, 55 S.W. 12 (1900).

Where there has been a fraudulent concealment of a cause of action, the statute does not run until the discovery of the fraud. *Conditt v. Holden*, 92 Ark. 618, 123 S.W. 765 (1909).

Under this statute time will not run

until the discovery of the fraud, or until, with reasonable diligence, it might have been discovered. *City Nat'l Bank v. Sternberg*, 195 Ark. 503, 114 S.W.2d 39 (1938).

Evidence was sufficient to justify holding that fraud in sale of bonds was concealed and that cause of action was not barred by statute of limitations. *City Nat'l Bank v. Sternberg*, 195 Ark. 503, 114 S.W.2d 39 (1938).

Evidence held to make a jury question of whether defendant had by any improper act of her own concealed from plaintiff his cause of action so as to preclude the running of the statute of limitations. *Kurry v. Frost*, 204 Ark. 386, 162 S.W.2d 48 (1942).

Improper Act.

Escaping from penitentiary was held an improper act. *Reeder v. Cargill*, 102 Ark. 518, 145 S.W. 223 (1912).

Cited: *Scroggin Farms Corp. v. Howell*, 216 Ark. 569, 226 S.W.2d 562 (1950).

16-56-121. Prevention of commencement of action — Foreign debtors absconding to this state.

If any debtor shall fraudulently abscond from any other state, territory, or district to this state without the knowledge of his, her, or their creditor, the creditor may commence suit against the absconding debtor within the times in this act, or any other acts of limitations, in force on December 14, 1844, prescribed for limiting the action, after the creditor may become apprised of the residence of the absconding debtor.

History. Acts 1844, § 4, p. 24; C. & M. Dig., § 6963; Pope's Dig., § 8941; A.S.A. 1947, § 37-231.

Meaning of "this act". See note to § 16-56-101.

CASE NOTES

ANALYSIS

Applicability.
Absconding debtor.
After accrual.

Applicability.

This section is restricted, by its terms, to absconding debtors, and is not applicable to replevin. *Payne v. Bruton*, 10 Ark. 53 (1849). See also *Smith v. Joyce*, 10 Ark. 460 (1850).

Absconding Debtor.

A foreign corporation that fails to ap-

point an agent on whom process may be served is not an absconding debtor. *Rachels v. Stecher Cooperage Works*, 95 Ark. 6, 128 S.W. 348 (1910).

One who leaves the state openly and with the knowledge of his creditor is not an absconding debtor. *Rock Island Plow Co. v. Masterson*, 96 Ark. 446, 132 S.W. 216 (1910).

After Accrual.

Absconding of debtor after cause of action accrues does not stop the statutes. *Richardson v. Cogswell*, 47 Ark. 170, 1 S.W. 51 (1886).

16-56-122. Tolling statute — Verbal promise or acknowledgment insufficient.

No verbal promise or acknowledgment in any action founded on a simple contract shall be deemed sufficient evidence to take any case out of the operation of this act or to deprive the party of the benefits thereof.

History. Rev. Stat., ch. 91, § 14; C. & M. Dig., § 6965; Pope's Dig., § 8943; A.S.A. 1947, § 37-216.

Meaning of "this act". See note to § 16-56-102.

RESEARCH REFERENCES

ALR. Insurer's waiver of defense of statute of limitations. 104 ALR 5th 331.

CASE NOTES

ANALYSIS

Applicability.
Consideration required.
Promise and acknowledgments.
—Acknowledgments.
—Promise.

Applicability.

This statute is not applicable to a new original promise. *Christian Women's Bd. v. Clark*, 140 Ark. 262, 215 S.W. 631 (1919).

Consideration Required.

An oral waiver of the statute of limitations or a promise not to plead it does not fall within statute requiring written acknowledgment of outlawed debt, but the promise or conduct must be based upon some consideration. *Dunnington v. Taylor*, 198 Ark. 770, 131 S.W.2d 627 (1939).

Promise and Acknowledgments.

Like all other acknowledgments and promises having legal force and sanction, they must be made to the person to whom the debt is due, or to one authorized to act for him, and with the intent at the time to pay it. *Ringo v. Brooks*, 26 Ark. 540 (1871).

Under this section, it was held that to suspend the statute by promise or acknowledgment, the promise or acknowledgment must be in writing and signed by the party to be charged. *Burnett v. Turner*, 105 Ark. 290, 151 S.W. 249 (1912).

—Acknowledgments.

A written acknowledgment to revive a debt must be an unqualified and uncondi-

tional acknowledgment of the debt as a debt due at the time, or it must be an express promise to pay it, which presupposes such an acknowledgment. *Alston v. State Bank*, 9 Ark. 455 (1849); *Brown v. State Bank*, 10 Ark. 134 (1849); *Beebe v. Block*, 12 Ark. 595 (1852); *Grant v. Ashley*, 12 Ark. 762 (1852).

Written acknowledgment of a debt is a removal of the statute bar, and not a new contract. *Harlan v. Bernie & Meyer*, 22 Ark. 217 (1860); *Ringo v. Brooks*, 26 Ark. 540 (1871); *Kelley v. Telle*, 66 Ark. 464, 51 S.W. 633 (1899).

A written acknowledgment will not be sufficient to fix a new period for the statute of limitations to run from, if it embraces a qualification which rebuts the inference of an unconditional promise to pay. *Eureka Springs Sch. Dist. v. Cromer*, 52 Ark. 454, 12 S.W. 878 (1889).

It is not necessary that the intention to pay be expressed in the acknowledgment. *Morris v. Carr*, 77 Ark. 228, 91 S.W. 187 (1905).

—Promise.

A verbal promise does not revive a barred claim, nor does a written promise revive it, but gives a right of action coextensive with the new promise. *Worthington v. De Bardlekin*, 33 Ark. 651 (1878).

Where new promise is relied upon and it is conditional, the happening of the contingency provided for must be proved to sustain recovery. *Opp v. Wack*, 52 Ark. 288, 12 S.W. 565, 5 L.R.A. 743 (1889).

Action on oral guaranty of an open account is barred at end of three years after

last item was furnished. *Goldsmith v. First Nat'l Bank*, 169 Ark. 1162, 278 S.W. 22 (1925).

An oral admission of the correctness of an open account and promised payment interrupts the running from the due date of each item of the three year statute of limitations as to items not yet barred but

not as to items already barred by limitations. *Boatner v. Gates Bros. Lumber Co.*, 224 Ark. 494, 275 S.W.2d 627 (1955).

Cited: *Holmes v. Thompson*, 240 Ark. 818, 402 S.W.2d 400 (1966); *Hyde Wholesale Dry Goods Co. v. Edwards*, 255 Ark. 211, 500 S.W.2d 85 (1973).

16-56-123. Tolling statute — Endorsement of payment on bond or sealed instrument insufficient.

No endorsement of any payment written upon any bond or any other sealed instrument by or on behalf of the party to whom the payment shall be made shall be deemed a sufficient proof of the payment so as to take the case out of the operation of this act.

History. Rev. Stat., ch. 91, § 32; C. & M. Dig., § 6977; Pope's Dig., § 8955; A.S.A. 1947, § 37-217.

Meaning of "this act". See note to § 16-56-102.

CASE NOTES

ANALYSIS

In general.
Partial payments.

In General.

Endorsements are only memoranda or at most evidence, but endorsements of payments admitted by the debtor himself or assented to by him, even impliedly, will toll the statute. *McAbee v. Wiley*, 92 Ark. 245, 122 S.W. 623 (1909).

Partial Payments.

Partial payments endorsed on the record of a mortgage will continue the lien of the mortgage as against the rights of all third parties if made and endorsed before the debt is barred by the statute of limitations. *Wadley v. Ward*, 99 Ark. 212, 137 S.W. 808 (1911).

16-56-124. Tolling statute — Promise by joint contractor or executor.

When there are two (2) or more joint contractors or executors, no joint contractor or executor shall lose the benefit of this act by reason of any written acknowledgment or promise made and signed by any of the other joint contractors or executors. Nothing contained in this section shall be so construed as to alter, take away, or lessen the effect of any payment of any principal or interest made by any person whatever on any joint contract.

History. Rev. Stat., ch. 91, § 15; C. & M. Dig., § 6966; Pope's Dig., § 8944; A.S.A. 1947, § 37-218.

Meaning of "this act". See note to § 16-56-102.

CASE NOTES

ANALYSIS

Acknowledgment and promise.

Part payment.

—Proof.

Voluntary payment.

Acknowledgment and Promise.

A new promise in writing by one joint debtor, after the bar has attached, does not take the debt out of the statute of limitations as to the other debtors. *Biscoe v. Jenkins*, 10 Ark. 108 (1849); *Grant v. Ashley*, 12 Ark. 762 (1852); *Woody v. State Bank*, 12 Ark. 780 (1852).

Under this section, a joint contractor is not bound by a written acknowledgment or promise made and signed by the other joint contractor so as to stop the statute of limitations. *Meisner v. Pattee*, 170 Ark. 217, 279 S.W. 787 (1926).

Part Payment.

Part payment by one joint debtor before the bar attaches will bind the other joint debtor. Payment by one is payment for all. *Trustees Real Estate Bank v. Hartfield*, 5 Ark. 551 (1844); *Burr v. Williams*, 20 Ark. 171 (1859).

Part payment of the debt before the bar attaches forms a new point from which the statute will begin to run. *Trustees Real Estate Bank v. Hartfield*, 5 Ark. 551 (1844); *Biscoe v. Jenkins*, 10 Ark. 108 (1849); *Durritt v. Trammell*, 11 Ark. 183 (1850); *Hicks v. Lusk & Co.*, 19 Ark. 692 (1858); *Burr v. Williams*, 20 Ark. 171 (1859); *Chase v. Carney*, 60 Ark. 491, 31 S.W. 43 (1895); *Everton v. Day*, 66 Ark. 73, 48 S.W. 900 (1898); *Less v. Arndt*, 68 Ark. 399, 59 S.W. 763 (1900).

Part payment by one joint debtor after the bar attaches does not revive the debt against the other joint debtors. *Biscoe v. Jenkins*, 10 Ark. 108 (1849); *Biscoe v.*

James, 10 Ark. 163 (1849); *Mason v. Howell*, 14 Ark. 199 (1853); *Ruddell v. Folsom*, 14 Ark. 213 (1853); *Hicks v. Lusk & Co.*, 19 Ark. 692 (1858); *Burr v. Williams*, 20 Ark. 171 (1858).

Part payment will not remove the statute bar as to third persons not in privity with the debtor or creditor. *Mayo & Jones v. Cartwright*, 30 Ark. 407 (1875).

Part payment by administrator of unprobated mortgage debt does not suspend running of statute. *Cox v. Phelps*, 65 Ark. 1, 45 S.W. 990 (1897).

—Proof.

In order to prove part payment as against a co-obligor, it must be shown that the payment was made at a time when its legal effect would be to remove the statutory bar. The mere endorsement of a credit as of a date to effect this is not sufficient, but it must be shown that the endorsement of payment was in fact made within the time; where the endorsement is made by the obligors, or one of them, the proof of that fact will be sufficient evidence to permit the endorsement to be read as evidence of the date and fact of payment. *Ruddell v. Folsom*, 14 Ark. 213 (1853).

Where the fact of part payment is relied upon to stop the running of the statute, the burden is on the plaintiff to prove part payment. *Simpson v. Brown-Desnoyers Shoe Co.*, 70 Ark. 598, 70 S.W. 305 (1902).

Voluntary Payment.

This section refers to a payment that is voluntary and the application of the proceeds arising from a foreclosure of a mortgage or the surrender of mortgaged property for foreclosure by a joint contractor does not stop the running of the statute of limitations as to the other contractor. *Meisner v. Pattee*, 170 Ark. 217, 279 S.W. 787 (1926).

16-56-125. Actions against tortfeasors whose identity is unknown.

(a) For the purposes of tolling the statute of limitations, any person, firm, or corporation may file a complaint stating his or her cause of action in the appropriate court of this state, whenever the identity of the tortfeasor is unknown.

(b)(1) The name of the unknown tortfeasor shall be designated by the pseudo-name John Doe or, if there is more than one (1) tortfeasor, John Doe 1, John Doe 2, John Doe 3, etc.

(2) Upon determining the identity of the tortfeasor, the complaint shall be amended by substituting the real name for the pseudo-name.

(c) It shall be necessary for the plaintiff or plaintiff's attorney to file with the complaint an affidavit that the identity of the tortfeasor is unknown before this section shall apply.

History. Acts 1959, No. 140, §§ 1-3; A.S.A. 1947, §§ 37-234 — 37-236.

CASE NOTES

ANALYSIS

Applicability.

Failure to name party.

Applicability.

Although the mother amended her complaint to substitute a contractor for one of the John Doe defendants within the 90 days allotted by this section and claimed that the amended complaint was timely, the argument failed because the court would have to apply Arkansas' three-year statute of limitations, and it was Tennessee's one-year statute of limitations that governed the case. *Hall v. Summit Contrs., Inc.*, 356 Ark. 609, 158 S.W.3d 185 (2004).

Failure to Name Party.

Patient was aware that the nurse could, and should, have been specifically named as a defendant from the outset of the case where the patient knew of the nurse's existence and his name was on the operative report prepared on the day of the surgery; the failure to name the nurse in the original complaint was not a mere mistake of identity, and this section only allows a complaint to be filed against a John Doe defendant when the plaintiff cannot identify the tortfeasor. *Stephens v. Petrino*, 350 Ark. 268, 86 S.W.3d 836 (2002).

Cited: *Harvill v. Community Methodist Hosp. Ass'n*, 302 Ark. 39, 786 S.W.2d 577 (1990).

16-56-126. Commencement of new action or filing mandate after nonsuit or arrest or reversal of judgment.

(a)(1) If any action is commenced within the time respectively prescribed in this act, in §§ 16-116-101 — 16-116-107, in §§ 16-114-201 — 16-114-209, or in any other act, and the plaintiff therein suffers a nonsuit, or after a verdict for him or her the judgment is arrested, or after judgment for him or her the judgment is reversed on appeal or writ of error, the plaintiff may commence a new action within one (1) year after the nonsuit suffered or judgment arrested or reversed.

(2)(A) However, if after judgment for plaintiff the judgment is reversed on appeal or writ of error and the cause is remanded for another trial, the mandate shall be taken out and filed in the court from which the appeal is taken within one (1) year from rendition of the judgment of reversal.

(B) Otherwise, the cause shall be forever barred.

(b) If the cause of action survives to the plaintiff's heirs or to his or her executors or administrators, they may in like manner commence a new action or take out a mandate within the time allowed the plaintiff.

History. Rev. Stat., ch. 91, § 21; Acts 1891, No. 159, § 3, p. 280; C. & M. Dig., § 6969; Pope's Dig., § 8947; Acts 1983, No. 145, § 1; 1985, No. 221, § 1; A.S.A. 1947, § 37-222.

Meaning of "this act". See note to § 16-56-102.

Cross References. Time within which mandate of Supreme Court must be taken out and filed in inferior court, § 16-67-325.

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Civil Procedure, 8 UALR L.J. 555.

Survey — Civil Procedure, 12 UALR L.J. 135.

CASE NOTES

ANALYSIS

In general.
Construction.
Purpose.
Adoption.
Appeal.
Applicability.
Burden of proof.
Commencement of new action.
Complaint amended.
Dismissal with prejudice.
Dismissal without prejudice.
Entitlement to privilege.
Good faith.
Nonsuit.
Pleading.
Suit barred.
Tolling statute of limitations.

In General.

This section does not narrow the period of limitation in the case of a nonsuit but extends the period of limitations applicable to the cause of action. *Love v. Cahn*, 93 Ark. 215, 124 S.W. 259 (1909); *Williford v. Williford*, 102 Ark. 65, 143 S.W. 132 (1912).

This section did not create a new liability, but only qualified the statute of limitations applicable to actions where a nonsuit had been filed. *Partin v. Wade*, 172 F.2d 50 (8th Cir. 1949).

Where action is not barred by limitations second action may be brought more than one year after nonsuit. *Eades v. Joslin*, 219 Ark. 688, 244 S.W.2d 623 (1951).

This section authorizes the dismissal of an action without prejudice to the right to bring another action for the same cause. *Campbell v. Coldstream Fisheries, Inc.*, 230 Ark. 284, 322 S.W.2d 79 (1959).

The dismissal of a cause of action without prejudice permits the bringing of a subsequent action for the same cause. *Oliver v. Miller*, 239 Ark. 1043, 396 S.W.2d 288 (1965).

Attorneys were not negligent in failing to timely refile client's medical malpractice claim within the one-year time period allowed for refiling a claim under this section, where the law concerning timely refiling of a complaint after taking a nonsuit had not been settled. *Pugh v. Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997).

Construction.

Section 16-57-104(a), concerning transfer of jurisdiction to proper forum, is compatible with this section, Arkansas's savings statute. *Linder v. Howard*, 296 Ark. 414, 757 S.W.2d 549 (1988).

The extension provided in § 16-114-204 (repealed) was not intended to apply to this section. *Pugh v. St. Paul Fire & Marine Ins. Co.*, 317 Ark. 304, 877 S.W.2d 577 (1994).

Under Arkansas law, negligence, failure to warn, breach of warranty, and strict liability are each distinct causes of action, requiring different elements of proof; thus, the plaintiff's federal causes of action for breach of warranty, failure to warn, and strict liability were time-barred because they were not pleaded in the state products liability complaint and, therefore, were not tolled by operation of this section. *Dillaha v. Yamaha Motor Corp.*, 23 F.3d 1376 (8th Cir. 1994).

Purpose.

It is not the purpose of the one year nonsuit statute, which tolled statute of limitations for one year, to shorten plaintiff's rights; plaintiff was not prohibited

from bringing suit for damages and an injunction two years after the cause of action even though plaintiff had taken a nonsuit one year after the cause of action in a case involving same facts. *Shelton v. Jack*, 239 Ark. 875, 395 S.W.2d 9 (1965).

Adoption.

The one-year statute of limitations in § 9-9-216(b)(1) provides a special procedure which cannot be annulled by ARCP 41(a) or this section, which allows an action dismissed without prejudice to be refiled within one year of the dismissal. In *re Martindale*, 327 Ark. 685, 940 S.W.2d 491 (1997).

Appeal.

From the decision that ARCP 41(a) permitted voluntary nonsuit without prejudice after notice of appeal was filed, it follows that this section allows the appeal to be refiled within one year. *Sosebee v. County Line Sch. Dist.*, 320 Ark. 412, 897 S.W.2d 556 (1995).

Applicability.

Where no nonsuit has been suffered, nor arrest of judgment made, nor reversal had on appeal, this statute does not apply. *Hill v. Pipkins*, 72 Ark. 549, 81 S.W. 1216 (1904).

This statute does not narrow the period of limitation in which an action may be brought upon a claim which is not otherwise barred by the general statute of limitations applicable to the claim; it only applies to those causes of action which would otherwise be barred before the running of one year from the time of taking a nonsuit. *Mitchell v. Federal Land Bank*, 206 Ark. 253, 174 S.W.2d 671 (1943).

Where plaintiff filed diversity action in federal court within limitation period against defendant who was resident of another state at the time of the accident but action was dismissed without prejudice because defendant was resident of Arkansas at the time action was filed, plaintiff could refile in state court within one year even though limitation period had run. *Coleman v. Young*, 256 Ark. 759, 510 S.W.2d 877 (1974).

In applying § 16-56-105 to civil rights actions under 42 U.S.C. § 1983, the circuit court will recognize decisions of the Arkansas Supreme Court regarding the applicability of this section to claims subject to the three-year limitation as it has

in contexts other than civil rights litigation. *Whittle v. Wiseman*, 683 F.2d 1128 (8th Cir. 1982).

This section does not apply to actions under Title VII of the Civil Rights Act of 1964 since those actions are governed by a federal statute of limitations; however, the section would apply to an action under 42 U.S.C. § 1981 which guarantees equal rights. *Garrison v. International Paper Co.*, 714 F.2d 757 (8th Cir. 1983).

Limitation period for filing objections to discharge or complaints to determine dischargeability of debts of bankrupt is set by federal statutory law and this section is not applicable to permit a refile of a complaint dismissed without prejudice by the bankruptcy court. *Davis v. Lewis*, 36 Bankr. 88 (E.D. Ark. 1984).

The Arkansas savings statutes, § 4-2-725 and this section, apply to actions originally filed in a foreign state if the original action was commenced within the statute of limitations specified for similar causes of action under Arkansas law. *LaBarge, Inc. v. Universal Circuits, Inc.*, 751 F. Supp. 807 (W.D. Ark. 1990).

This section is written in the conjunctive, meaning two conditions must be met in order to fall within its language; the original action must be timely, and the plaintiff must suffer a nonsuit in that action. *Follette v. Wal-Mart Stores, Inc.*, 47 F.3d 311 (8th Cir. 1995), cert. denied, 516 U.S. 814, 116 S. Ct. 66, 133 L. Ed. 2d 28 (1995).

The savings statute applies only to actions governed by a general statute of limitations and not to proceedings, such as election contests, in which the right to file is limited to a very short period. *McCastlain v. Elmore*, 340 Ark. 365, 10 S.W.3d 835 (2000).

The statute does not apply where the original statute of limitations had not yet expired. *Elzea v. Perry*, 340 Ark. 588, 12 S.W.3d 213 (2000).

Burden of Proof.

Plaintiff must prove bringing of action within one year after dismissal of former action. *Watkins v. Martin*, 69 Ark. 311, 65 S.W. 103 (1901).

Commencement of New Action.

Service of summons on second suit after dismissal of first suit saves second suit, though it was brought before first was

dismissed. *Sims v. Miller*, 151 Ark. 377, 236 S.W. 828 (1922).

The issuance of a summons in a transitory action within one year after nonsuit was taken and delivery thereof to the sheriff of the county of the venue is not the commencement of a new action where in the meantime the defendant had changed his residence to another state. *Cherry v. Falvey*, 188 Ark. 827, 68 S.W.2d 98 (1934).

Suit was barred by three year limitation period of § 16-56-105, but filing of suit within three years of cause of action, with plaintiff taking a nonsuit after the three years and bringing another action under this section was not barred. *Smithey v. St. Louis S.W. Ry.*, 127 F. Supp. 210 (E.D. Ark. 1955).

This section permitted the filing of a claim in a state court more than one year after a "nonsuit suffered" in federal court was affirmed, and rehearing denied, by the United States Circuit Court of Appeals but less than one year after certiorari was denied in the case by the U.S. Supreme Court. *Lubin v. Crittenden Mem. Hosp.*, 288 Ark. 370, 705 S.W.2d 872 (1986).

Because the plaintiff failed to meet the service requirements contemplated or specifically provided for in ARCP 3 and 4(i), he also failed to commence the action so as to effectuate the one-year savings provision provided in this section. *Green v. Wiggins*, 304 Ark. 484, 803 S.W.2d 536 (1991).

Second complaint held timely. *Brown v. Saint Paul Mercury Ins. Co.*, 308 Ark. 361, 823 S.W.2d 908 (1992).

Under ARCP 3, an action is commenced by the filing of a complaint with the clerk of the proper court, and the establishment of venue and the tolling of a statute of limitations is based on the date the complaint is filed; however, the commencement date is subject to the plaintiff completing service within 120 days from the date of filing of the complaint, unless the time for service has been extended by the court under ARCP 4(i). *Forrest City Mach. Works, Inc. v. Lyons*, 315 Ark. 173, 866 S.W.2d 372 (1993).

This section allows a party to file a new complaint within one year of a nonsuit as long as the cause of action is the same in substance as the original complaint at the time the latter was nonsuited. *Dillaha v. Yamaha Motor Corp.*, 23 F.3d 1376 (8th Cir. 1994).

Court erred in awarding judgment to plaintiff in his breach of contract action against defendant because plaintiff's earlier failure to comply with the service requirements of Ark. R. Civ. P. 4(i) resulted in a failure to commence the action so as to effectuate the one-year savings provision provided in this section; hence, the action was barred by the five-year statute of limitations in § 16-56-111(a) *Long v. Bonds*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 11 (Jan. 5, 2005).

Complaint Amended.

Amended complaint on second suit was held sufficient as against demurrer where the amended complaint showed the bringing of the original suit in the same court, identified by date and docket number, the taking of a nonsuit at a specified date, and the commencement of a new action within the period set out in this section. *Partin v. Wade*, 172 F.2d 50 (8th Cir. 1949).

Where complaint in second action made same mistake in description and date as that contained in first action, the action was permitted even though plaintiff was permitted to amend complaint in second action by correcting description and date. *Cummings v. Greif Bros. Cooperage Co.*, 202 F.2d 824 (8th Cir. 1953).

Dismissal with Prejudice.

Where suit was dismissed with prejudice for want of prosecution, a subsequent suit for the same purpose is barred. *Leach v. Cook*, 211 Ark. 763, 202 S.W.2d 359 (1947).

Where suit was dismissed with prejudice for failure to prosecute, no nonsuit was suffered, and this section did not apply, plaintiff's only remedy was to appeal the original decision. *Follette v. Wal-Mart Stores, Inc.*, 47 F.3d 311 (8th Cir. 1995), cert. denied, 516 U.S. 814, 116 S. Ct. 66, 133 L. Ed. 2d 28 (1995).

Dismissal Without Prejudice.

Where earlier order was a dismissal without prejudice, it was error for the trial judge to grant summary judgment and preclude defendant's claim on the grounds of res judicata. *Magness v. McEntire*, 305 Ark. 503, 808 S.W.2d 783 (1991).

Entitlement to Privilege.

It was error to dismiss the second action for failure to pay costs in former action.

Turrentine v. St. Louis S.W. Ry., 96 Ark. 181, 131 S.W. 337 (1910).

A grantee being in privity of estate may bring a new action within the time specified. *Dressler v. Carpenter*, 107 Ark. 353, 155 S.W. 108 (1913).

The plaintiff brought an action and took a nonsuit, the cause being dismissed without prejudice. It was held that the plaintiff could bring a suit upon the same cause of action if he acted within the period of limitation. *Forschler v. Cash*, 128 Ark. 492, 194 S.W. 1029 (1917).

Successful plaintiff in justice court may take nonsuit on appeal to circuit court and bring another action. *Biddle v. Missouri Pac. R.R.*, 160 Ark. 323, 254 S.W. 666 (1923).

After plaintiff takes nonsuit of crossaction for breach of warranty, he may sue defendant's estate for the breach within a year of such nonsuit. *Fox v. Pinson*, 182 Ark. 936, 34 S.W.2d 459 (1930).

Dismissal because of defect in complaint amounted to a nonsuit without prejudice and plaintiffs were entitled to bring a suit on the same cause of action within one year from the dismissal. *Norm Co. v. Harris*, 197 Ark. 124, 122 S.W.2d 532 (1938).

A new suit can be brought by a plaintiff who, from causes that are incident to the administration of the law, was compelled to abandon an action, regardless of whether it was by his own act or by the act of the court, if either would leave a cause of action undetermined. *Cowan v. Patrick*, 247 Ark. 886, 448 S.W.2d 336 (1969).

Where trial court erred in finding that proper service had been made on defendant and entered default judgment against defendant, it would be unfair to expect the plaintiff not to rely on this finding and believe that its action was timely commenced, and plaintiff should therefore not be barred by statute of limitations where default judgment was set aside five years later. *Cole v. First Nat'l Bank*, 304 Ark. 26, 800 S.W.2d 412 (1990).

Good Faith.

A medical malpractice action was timely under the savings statute where the plaintiff first commenced an action against the defendant in federal district court in Arizona, but that action was dismissed for lack of personal jurisdiction, and less than a year later, she brought the

same claim in federal district court in Arkansas; the plaintiff wanted her case to be heard and adjudicated in Arizona, and the fact that her selection of Arizona as a forum may have turned out to have been erroneous was not a sufficient basis for a conclusion that she did not act in good faith. *Chandler v. Roy*, 272 F.3d 1057 (8th Cir. 2001).

Nonsuit.

To suffer a nonsuit it is not necessary that a suitor actually ask for and be granted a nonsuit in the trial court. *Wheeler v. Wallingsford*, 229 Ark. 576, 317 S.W.2d 153 (1958).

When a nonsuit is taken, the procedure which was adopted in that action has no bearing on a subsequent action. *Campbell v. Coldstream Fisheries, Inc.*, 230 Ark. 284, 322 S.W.2d 79 (1959).

For the purposes of this section, a dismissal of a complaint on defendant's motion is the same as a nonsuit. *Carton v. Missouri Pac. R.R.*, 295 Ark. 126, 747 S.W.2d 93 (1988); *West v. G.D. Searle & Co.*, 317 Ark. 525, 879 S.W.2d 412 (1994).

The day on which a nonsuit is taken should be excluded from computation. *Hodge v. Wal-Mart Stores, Inc.*, 297 Ark. 1, 759 S.W.2d 203 (1988).

This section could not save the wrongful-death claims of the children where the children were not parties to the first action that ended in a nonsuit. *Murrell v. Springdale Mem. Hosp.*, 330 Ark. 121, 952 S.W.2d 153 (1997).

Where no nonsuit was effectively granted because no order granting the nonsuit was entered, the one-year savings statute was never activated. *Blaylock v. Shearson Lehman Bros.*, 330 Ark. 620, 954 S.W.2d 939 (1997).

A nonsuit is not effective on the filing date; a court order is necessary to grant a nonsuit and the judgment or decree must be entered to be effective. *Blaylock v. Shearson Lehman Bros.*, 330 Ark. 620, 954 S.W.2d 939 (1997).

The right to nonsuit prior to the submission of the case to the jury is absolute; a nonsuit has the effect of an absolute withdrawal of the claim and carries with it all the pleadings and all issues with respect to a plaintiff's claim. *Tribco Mfg. Co. v. People's Bank of Imboden*, 67 Ark. App. 268, 998 S.W.2d 756 (1999).

When buyer of property nonsuited his

complaint against seller for breach of contract, the matter could not be subsequently litigated as it was barred by *res judicata*; claim should have been brought when foreclosure action was brought by seller. *Pentz v. Romine*, 75 Ark. App. 274, 57 S.W.3d 235 (2001).

Suit by the administrator of decedent's estate for wrongful death resulting from alleged medical malpractice was time-barred because it had not been filed within two years of the decedent's death as required by § 16-114-203; although the suit had been filed within one year of the date on which a previous suit against the same healthcare providers, filed by the decedent's heirs, had been non-suited, the estate had not been a party to the first action and could not, therefore, rely on the saving provision contained in this section to overcome the running of the statute of limitations. *Tatus v. Hayes*, 79 Ark. App. 371, 88 S.W.3d 864 (2002).

Pleading.

Allegations in previous case regarding court jurisdiction is of no consequence in a subsequent case, because before a court can assume jurisdiction there must be something in the present pleadings giving that court jurisdiction. *Campbell v. Coldstream Fisheries, Inc.*, 230 Ark. 284, 322 S.W.2d 79 (1959).

Suit Barred.

Evidence sufficient to bar second suit. *Yates v. Phillips*, 180 Ark. 709, 22 S.W.2d 559 (1929); *Thompson v. Pulaski-Lonokey Drainage Dist.*, 192 Ark. 1178, 90 S.W.2d 237 (1936); *Young v. Garrett*, 212 Ark. 693, 208 S.W.2d 189 (1948); *Casey v. Burdine*, 214 Ark. 680, 217 S.W.2d 613 (1949); *Wheeler v. Wallingsford*, 229 Ark. 576, 317 S.W.2d 153 (1958); *Taylor v. Goodwin*, 237 Ark. 121, 371 S.W.2d 617 (1963); *Nelson v. Wakefield*, 282 Ark. 285, 668 S.W.2d 29 (1984).

Where plaintiff filed a medical malpractice action on March 4, 1994, two days short of the two-year statute of limitations under § 16-114-203(a), and had until July 2, 1994, to complete service of process pursuant to ARCP 4(1), requested another 120 days on June 23, 1994, and was granted a 30-day extension on July 28, 1994, and where plaintiff, after failing to obtain service, requested a nonsuit on August 18, 1994, which was granted on

September 14, 1994, the claim refiled on August 11, 1995, had not invoked this section's one-year savings provision and was barred by the statute of limitations. *Thomson v. Zufari*, 325 Ark. 208, 924 S.W.2d 796 (1996).

When a decedent's heirs nonsuited their wrongful death claim, the claim could not be refiled after expiration of the applicable statute of limitations, by the administrator of the decedent's estate, even though she was one of the heirs who filed the wrongful death claim, as this section only allowed a claim to be refiled after nonsuit by the same parties who filed the original action. *Smith v. St. Paul Fire & Marine Ins. Co.*, 76 Ark. App. 264, 64 S.W.3d 764 (2001).

Where a wrongful-death complaint was not in compliance with § 16-62-102 and the statute of limitations had run, barring heirs from commencing a wrongful-death action against a doctor, the wife of the deceased was also barred from pursuing a separate claim for loss of consortium, which was derivative to wrongful-death action. *Sanderson v. McCollum*, 82 Ark. App. 111, 112 S.W.3d 363 (2003).

Where heirs were not plaintiffs to their mother's first wrongful-death complaint, they could not benefit from the application of the savings statute where, at the time the heirs filed their wrongful-death suit, the two-year statute of limitations had already run, barring their claim; the heirs could not ratify the first suit filed by their mother so as to have come within the savings statute because that suit had been non-suited and, therefore, there was no valid cause of action for them to have ratified. *Sanderson v. McCollum*, 82 Ark. App. 111, 112 S.W.3d 363 (2003).

Circuit court's dismissal of the buyer's case for failure of service of valid process was upheld where, in order to invoke the protection of the savings statute, the buyer had to timely commence the original action; the buyer's fraud claim against the car dealership was therefore time barred and the savings statute did not apply. *Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, 353 Ark. 701, 120 S.W.3d 525 (2003).

Tolling Statute of Limitations.

Although an action is brought in a court without jurisdiction, yet its pendency will arrest the statute if a proper action is

commenced within a year after the judgment in first suit is vacated. *Little Rock, M.R. & T. Ry. v. Manees*, 49 Ark. 248, 4 S.W. 778 (1887).

In order to suspend the statute of limitations the action must be properly commenced. *Wilkins v. Worthen*, 62 Ark. 401, 36 S.W. 21 (1896).

Where plaintiff filed a tort action against the defendant within two year period of limitations and took a nonsuit, plaintiff could maintain a second suit based on same cause of action where filed within one year of the nonsuit, though second action was filed more than two years after the occurrence of the tort. *Partin v. Wade*, 172 F.2d 50 (8th Cir. 1949).

When the court lacking subject matter jurisdiction has, by statute, authority to transfer the action to a court of competent jurisdiction, timely filing of the suit in the first court tolls the statute of limitations. *Linder v. Howard*, 296 Ark. 414, 757 S.W.2d 549 (1988).

To toll the limitations period and to invoke the saving statute, a plaintiff need only file his or her complaint within the statute of limitations and complete timely service on a defendant under ARCP 4; a court's later ruling which finds completed service invalid does not disinherit the plaintiff from the benefit of the saving statute. *Forrest City Mach. Works, Inc. v. Lyons*, 315 Ark. 173, 866 S.W.2d 372 (1993).

Where plaintiff filed a timely action against and completed service upon defendant in his prior lawsuit, the applicable limitations period was tolled, and he was thereby entitled to invoke this section when refiled his complaint. *Forrest City Mach. Works, Inc. v. Lyons*, 315 Ark. 173, 866 S.W.2d 372 (1993).

Trial court properly refused to apply the doctrine of equitable tolling to delay the running of the one-year saving statute so that wrongful death plaintiffs' fifth amended complaint could be deemed timely where their attorney was not sufficiently diligent in the seven-week period he had to rename the defendant to merit the application of the doctrine of equitable tolling. *Stracener v. Williams*, 84 Ark. App. 208, 137 S.W.3d 428 (2003).

Cited: *Robison v. Jones*, 261 F.2d 584 (8th Cir. 1958); *Credit Indus. Co. v. Blankinship*, 230 Ark. 371, 323 S.W.2d 198 (1959); *Vines v. Arkansas Power & Light Co.*, 232 Ark. 173, 337 S.W.2d 722 (1960); *Farm Serv. Coop. v. Goshen Farms, Inc.*, 267 Ark. 324, 590 S.W.2d 861 (1979); *Weston v. Bachman*, 682 F.2d 202 (8th Cir. 1982); *Blakemore v. Missouri Pac. R.R.*, 789 F.2d 616 (8th Cir. 1986); *Ware v. Gardner*, 309 Ark. 148, 827 S.W.2d 657 (1992); *Goldsbey v. Fairley*, 309 Ark. 380, 831 S.W.2d 142 (1992); *Oxford v. Perry*, 340 Ark. 577, 13 S.W.3d 567 (2000); *Miller v. Norris*, 247 F.3d 736 (8th Cir. 2001); *Nef v. AG Servs. of Am., Inc.*, 79 Ark. App. 100, 86 S.W.3d 4 (2002).

16-56-127. Mutual open accounts — Accrual of cause of action.

In actions brought to recover any balance due upon a mutual open account current, the cause of action shall be deemed to have accrued from the time of the last item proved in the account.

History. Rev. Stat., ch. 91, § 12; C. & M. Dig., § 6964; Pope's Dig., § 8942; A.S.A. 1947, § 37-215.

CASE NOTES

ANALYSIS

Action barred.
Action not limited.
Mutual open account.

Action Barred.

Since an account with the improvement districts was in the nature of an account

current and the suit was brought as soon as the shortage was discovered, the statute of limitations was without application. *Murphy v. Marshall*, 203 Ark. 986, 159 S.W.2d 741 (1942).

Action Not Limited.

In a suit on a mutual account, the

plaintiff was not limited to recovery of items sold within three years prior to the action, and a charge limiting recovery to items purchased within three years before institution of the action was error. *T. M. Dover Merchantile Co. v. Myers*, 180 Ark. 576, 21 S.W.2d 972 (1929).

Mutual Open Account.

"Mutual open account" means something more than charges on one side and credits of payments on the other. There

must be mutual credit founded on a subsisting debt on the other side, or an express or implied agreement for a setoff of mutual debts. *McNeil v. Garland & Nash*, 27 Ark. 343 (1871); *McConnell v. Arkansas Coffin Co.*, 172 Ark. 87, 287 S.W. 1007 (1926).

Evidence sufficient to find mutual accounts. *T. M. Dover Merchantile Co. v. Myers*, 180 Ark. 576, 21 S.W.2d 972 (1929); *Refco, Inc. v. Farm Prod. Ass'n*, 844 F.2d 525 (8th Cir. 1988).

16-56-128. Guaranteed student loans.

There shall be no greater statute of limitations defense available to a borrower who has defaulted on a loan guaranteed by the Student Loan Guarantee Foundation of Arkansas than would be available had the borrower defaulted on an obligation to the State of Arkansas.

History. Acts 1987, No. 574, § 3.

Cross References. Administration of

student loan provisions of federal laws, § 6-81-201.

16-56-129. [Repealed.]

Publisher's Notes. This section, concerning arrearages and limitations on child support, was repealed by Acts 1995, No. 1184, § 30. The section was derived from Acts 1989, No. 525, § 1.

Acts 1989, No. 525, § 1, is also codified as § 9-14-236.

16-56-130. Civil actions based on sexual abuse.

(a) Notwithstanding any other statute of limitations or any other provision of law that can be construed to reduce the statutory period set forth in this section, any civil action based on sexual abuse which occurred when the injured person was a minor but is not discovered until after the injured person reaches the age of majority shall be brought within three (3) years from the time of discovery of the sexual abuse by the injured party.

(b)(1) A claim based on an assertion of more than one (1) act of sexual abuse is not limited to the injured party's first discovery of the relationship between any one (1) of those acts and the injury or condition, but may be based on the injured party's discovery of the effect of the series of acts.

(2) It is not necessary for the injured party to establish which act in a series of acts of childhood sexual abuse caused the injury or condition that is the subject of the lawsuit.

(c) For the purposes of this section:

(1) "Childhood sexual abuse" means sexual abuse which occurred when the injured person was a minor;

(2) "Minor" means a person of less than eighteen (18) years of age; and

(3) "Time of discovery" means when the injured party discovers the effect of the injury or condition attributable to the childhood sexual abuse.

History. Acts 1993, No. 370, § 1.

Publisher's Notes. Acts 1993, No. 370, § 2, provided: "This act is applicable

to all actions filed on or after the effective date of the act [August 13, 1993]."

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Civil Procedure, 16 UALR L.J. 85.

Cross References. Persons under dis-

abilities at time of accrual of action, § 16-56-116.

SUBCHAPTER 2 — UNIFORM CONFLICT OF LAWS LIMITATIONS ACT

SECTION.

16-56-201 — 16-56-210. [Repealed.]

16-56-201 — 16-56-210. [Repealed.]

Publisher's Notes. This subchapter, concerning uniform conflicts of laws forms of action, was repealed by Acts 1999, No. 310, § 1. The subchapter was derived from the following sources:

16-56-201. Acts 1985, No. 387, § 1; A.S.A. 1947, § 37-302.

16-56-202. Acts 1985, No. 387, § 2; A.S.A. 1947, § 37-303.

16-56-203. Acts 1985, No. 387, § 3; A.S.A. 1947, § 37-304.

16-56-204. Acts 1985, No. 387, § 4; A.S.A. 1947, § 37-305.

16-56-205. Acts 1985, No. 387, § 5; A.S.A. 1947, § 37-306.

16-56-206. Acts 1985, No. 387, § 6; A.S.A. 1947, § 37-307.

16-56-207. Acts 1985, No. 387, § 7; A.S.A. 1947, § 37-301.

16-56-208. Acts 1985, No. 387, § 8.

16-56-209. [Reserved.]

16-56-210. Acts 1985, No. 387, § 9.

CHAPTER 57

FORMS OF ACTION

SECTION.

16-57-101 — 16-57-109. [Repealed.]

16-57-101 — 16-57-109. [Repealed.]

Publisher's Notes. This chapter, concerning forms of action, was repealed by Acts 2003, No. 1185, § 189. The chapter was derived from the following sources:

16-57-101. Civil Code, § 3; C. & M. Dig., § 1033; Pope's Dig., § 1235; A.S.A. 1947, § 27-204.

16-57-102. Civil Code, § 13; C. & M. Dig., § 1047; Pope's Dig., § 1249; A.S.A. 1947, § 27-215.

16-57-103. Civil Code, § 4; C. & M. Dig., § 1034; Pope's Dig., § 1236; A.S.A. 1947, § 27-205.

16-57-104. Civil Code, §§ 7-9; C. & M. Dig., §§ 1041, 1042, 1044; Pope's Dig., §§ 1243, 1244, 1246; A.S.A. 1947, §§ 27-208 — 27-210.

16-57-105. Civil Code, § 12; C. & M. Dig., § 1043; Pope's Dig., § 1245; A.S.A. 1947, § 27-211.

16-57-106. Civil Code, § 10; C. & M. Dig., § 1045; Pope's Dig., § 1247; A.S.A. 1947, § 27-212.

16-57-107. Civil Code, § 11; C. & M. Dig., § 1046; Pope's Dig., § 1248; A.S.A. 1947, § 27-213.

16-57-108. Civil Code, § 14; C. & M. Dig., § 1048; Pope's Dig., § 1250; A.S.A. 1947, § 17-214.

16-57-109. Civil Code, § 6; C. & M. Dig., § 1036; Pope's Dig., § 1238; A.S.A. 1947, § 27-207.

CHAPTER 58

COMMENCEMENT OF ACTION — PROCESS

SECTION.

- 16-58-101. Payment of fees prerequisite to entry of action or issuance of writ.
- 16-58-102. Style of process issued by judge, justice, or other officer.
- 16-58-103. Summons generally.
- 16-58-104. Alias or pluries writs.
- 16-58-105. Seal.
- 16-58-106. Issuance and execution of process, writ, summons, etc., on Sunday or a holiday.
- 16-58-107. [Superseded.]
- 16-58-108. [Superseded.]
- 16-58-109. [Superseded.]
- 16-58-110. Sheriff to attend clerk's office to receive process.
- 16-58-111. Endorsement of day and hour of receipt on process.
- 16-58-112. [Superseded.]
- 16-58-113. [Superseded.]
- 16-58-114. [Repealed.]
- 16-58-115. Sheriff to note time of service.
- 16-58-116. Acknowledgment of service.
- 16-58-117. Return.
- 16-58-118. [Superseded.]
- 16-58-119. [Superseded.]
- 16-58-120. Method of service — Resident and nonresident defen-

SECTION.

- dants out of state — Secretary of State agent.
- 16-58-121. Method of service — Nonresident or absent owner, chauffeur, driver, or operator — Survival of action.
- 16-58-122. Method of service — Owner or operator of motor buses or trucks.
- 16-58-123. Method of service — Owner or officer of steamboat or watercraft.
- 16-58-124. Method of service — Corporations.
- 16-58-125. Method of service — Corporate agent at branch office.
- 16-58-126. Method of service — Corporations — Secretary of State.
- 16-58-127. Method of service — Foreign corporations.
- 16-58-128. [Repealed.]
- 16-58-129. Method of service — Insurance company.
- 16-58-130. Constructive service — Warning orders.
- 16-58-131. [Superseded.]
- 16-58-132. Refusal to accept process served by mail.
- 16-58-133. [Superseded.]
- 16-58-134. Time limit for service.

Publisher's Notes. Some provisions of this chapter may be superseded by the Arkansas Rules of Civil Procedure and Rules for Inferior Courts [now District Courts] pursuant to the Supersession Rule adopted by the Supreme Court of Arkansas in its order of December 18, 1978.

Cross References. Uniform Interstate and International Procedure Act, §§ 16-4-101 — 16-4-108.

Effective Dates. Acts 1842, § 36, p. 27: Jan. 1, 1843.

Acts 1846, § 5, p. 86: effective on passage.

Acts 1871, No. 48, § 1 [890]: effective 90 days after passage.

Acts 1875, No. 77, § 53: effective on passage.

Acts 1877, No. 56, § 2: effective on passage.

Acts 1901, No. 106, § 2: effective on passage.

Acts 1915, No. 290, § 24: June 1, 1915.

Acts 1931, No. 42, § 2: approved Feb. 18, 1931. Emergency clause provided: "In view of the fact that a large number of banks in the state are now in the process of liquidation and many actions will be commenced in the courts of this state in

which the state bank commissioner will be a necessary party and delay will be occasioned by obtaining service of process on the state bank commissioner in person, an emergency is ascertained and declared to exist and this act shall be in full force and effect from and after its passage."

Acts 1935, No. 70, § 3: became law without Governor's signature, Feb. 26, 1935. Emergency clause provided: "Whereas many motor buses, coaches and trucks are being operated upon the public highways of this state and by reason of their operation persons are being injured and their property damaged and in many instances there is now no agent of the owner or operator of such vehicles upon whom service of summons can be had in counties through which same are being operated, therefore an emergency exists on account of such injuries and damages to persons and property and no adequate provisions for service of summons existing, it is found that this act is necessary for the immediate preservation of the public peace, health and safety, and an emergency is hereby declared to exist, and this act shall be in full force and effect from and after passage."

Acts 1947, No. 347, § 6: Mar. 28, 1947. Emergency clause provided: "Whereas many nonresident persons, firms, partnerships and corporations are not now qualified under the Constitution and laws of this State to do business herein and by reason of operating business in and through the State of Arkansas injury and damage are being done to persons and property within said State; and whereas in cases of such injury and damage by such nonresident defendants those suffering damages thereby have no convenient method by which they may sue to enforce their rights, if any, in the State of Arkansas, and this act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared to exist and this act shall

be in full force and effect from and after its passage and approval."

Acts 1960 (Ex. Sess.), No. 11, § 2: Jan. 21, 1960. Emergency clause provided: "It has been found and it is hereby declared by the General Assembly that undue hardships are placed upon many victims of accidents involving nonresident motorists in that many of them are unable to make bond for costs when effecting service of process as plaintiffs in actions brought against such nonresidents, thereby preventing them from having their rights litigated in court. Therefore, an emergency is hereby declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in full force on and after the date of its passage and approval."

Acts 1997, No. 969, § 5: Mar. 31, 1997. Emergency clause provided: "It is hereby found and determined by the General Assembly that Arkansas Code 16-58-106(c) permits an order of attachment or order for delivery of property to be issued or executed on Sunday only under very limited circumstances; that this provision is unfair to judgment creditors in that failure to issue or execute such order on Sunday may result in the property being concealed or removed from the jurisdiction; that this act is designed to permit the issuance and execution of such orders on any day including Sunday without restrictions and should be given effect immediately to protect judgment creditors in the state. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

RESEARCH REFERENCES

ALR. In personam jurisdiction over nonresident based on ownership, use, possession, or sale of real property. 4 ALR 4th 955.

In personam jurisdiction under long-

arm statute of nonresident banking institution. 9 ALR 4th 661.

Validity of substituted service of process upon liability insurer of unavailable tortfeasor. 17 ALR 4th 918.

In personam jurisdiction, under long-arm statute, over nonresident attorney in legal malpractice action. 23 ALR 4th 1044.

In personam jurisdiction, under long-arm statute, over nonresident physician, dentist, or hospital in medical malpractice action. 25 ALR 4th 706.

Religious activities as doing or transaction of business under long-arm statutes or rules of court. 26 ALR 4th 1176.

Bringing action to trial or other activity sufficient to avoid dismissal under statute or court rule. 32 ALR 4th 840.

C.J.S. 72 C.J.S., Process, § 1 et seq.

16-58-101. Payment of fees prerequisite to entry of action or issuance of writ.

(a) No action shall be entered upon the docket of any court nor any original mesne or final process issued in the action, except in criminal cases and cases where the state is plaintiff, until the fees for entering the case upon the docket and for issuing the writ and the taxes thereon, if any, are paid, or bond and security to the approval of the clerk given therefore.

(b) No clerk shall be liable to an action for refusing to docket a cause or issue any writ unless the fee and tax thereon is first tendered or secured as provided in this section.

History. Acts 1875, No. 77, § 8, p. 167; C. & M. Dig. § 4574; Pope's Dig., § 5658; A.S.A. 1947, § 27-302.

Cross References. Circuit court clerks — Miscellaneous fees, § 21-6-402.

CASE NOTES

Liability of Clerk.

The clerk was not liable to an action for refusing to docket a cause or issue any writ where the fees required by this section were not tendered, paid, or secured to

the circuit court clerk by the plaintiff in spite of the demands made by the clerk to the plaintiff. *McClellan v. Young*, 232 Ark. 679, 339 S.W.2d 624 (1960).

16-58-102. Style of process issued by judge, justice, or other officer.

All writs and process issued by any judge, justice of the peace, or other officer authorized to issue the writ or process shall run in the name of the State of Arkansas and be signed by the officer issuing the writ or process.

History. Rev. Stat., ch. 159, § 3; C. & M. Dig. § 1125; Pope's Dig., § 1341; A.S.A. 1947, § 27-305.

16-58-103. Summons generally.

(a) No summons or order for a provisional remedy shall be issued by the clerk in any action before the plaintiff's complaint or petition therein is filed in his or her office.

(b) With every summons, the clerk shall issue as many copies thereof as there are defendants named therein unless otherwise ordered by the plaintiff.

(c)(1) A summons shall be issued at any time, to any county, against any one (1) or more of the defendants, at the plaintiff's request.

(2) But a summons not served shall not be taxed in the costs unless otherwise ordered by the court.

History. Civil Code, §§ 60, 61, 762; C. Dig., §§ 1343, 1353, 1354; A.S.A. 1947, & M. Dig., §§ 1127, 1137, 1138; Pope's §§ 27-310, 27-312, 27-313.

CASE NOTES

ANALYSIS

Fees.
Improper service.

Fees.

Decree allowing fees of clerk and stenographer for summons which had been constructively served, and disallowing fees for those personally served, was held unauthorized since the fee is not dependent upon manner in which sheriff serves the summons. *Sebastian Bridge Dist. v. Lynch*, 200 Ark. 134, 138 S.W.2d 81 (1940).

In suit to foreclose and enforce lien for delinquent improvement taxes where clerk signed, sealed, and delivered summonses to the sheriff, clerk and stenographer were held entitled to their fees and the fact that the summonses were printed makes no difference. *Sebastian Bridge Dist. v. Lynch*, 200 Ark. 134, 138 S.W.2d 81 (1940).

Improper Service.

Acceptance or acknowledgment of service precludes a party from taking advantage of defects or irregularities in the service but this is not the case where there is defective summons or no summons ever issued. *Storey v. Brewer*, 232 Ark. 552, 339 S.W.2d 112 (1960).

Acceptance or acknowledgment of service precludes the party from taking advantage of any defect or irregularities in the service, but the waiver cannot bind

third parties nor does it apply to any defects in the summons itself. The defendant may, by his conduct, be estopped to object to the manner in which service is made, but estoppel does not apply where the defect in the summons itself is so substantial as to render the process void. *Storey v. Brewer*, 232 Ark. 552, 339 S.W.2d 112 (1960).

Where, in a suit against a nonresident defendant, the plaintiff's attorney sent a summons to the defendant's address by registered mail and the defendant refused to accept the service, it was void since a summons should be delivered to the officer in the county authorized to execute a summons or to a person appointed by him. *Merriott v. Whitsell*, 251 Ark. 1031, 476 S.W.2d 230 (1972).

Summons issued to the doctor was clearly defective in two respects where (1) the summons was incorrectly dated September 5, 2000, exactly three months prior to the filing of the complaint on December 5, 2000, and (2) the summons incorrectly stated that the doctor had only 20 days to answer rather than 30 days, which was contrary to Ark. R. Civ. P. 12(a); thus, the trial court properly granted the doctor's motion to dismiss the complaint. *Vinson v. Ritter*, 86 Ark. App. 207, 167 S.W.3d 162 (2004).

Cited: *Piggott Junior Chamber of Commerce, Inc. v. Hollis*, 242 Ark. 205, 412 S.W.2d 595 (1967).

16-58-104. Alias or pluries writs.

When any writ or other process issued out of any court of this state is not executed, the clerk of the court shall issue an alias, pluries, or other proper process without an order of the court for that purpose on the application of the party suing out the writ or other process.

History. Rev. Stat., ch. 159, § 8; C. & M. Dig., § 1126; Pope's Dig., § 1342; A.S.A. 1947, § 27-311.

CASE NOTES

Alias Writ.

First or outstanding writ does not have to be returned unexecuted before clerk is

authorized to issue alias writ without court order. *Carnes v. Strait*, 223 Ark. 962, 270 S.W.2d 920 (1954).

16-58-105. Seal.

All writs shall be sealed with the judicial seal of the court.

History. Rev. Stat., ch. 159, § 2; C. & M. Dig., § 1124; Pope's Dig., § 1340; A.S.A. 1947, § 27-304.

Cross References. Official seals, § 1-4-108.

16-58-106. Issuance and execution of process, writ, summons, etc., on Sunday or a holiday.

(a) It shall be no objection to any process, writ, summons, affidavit, or order for a provisional remedy that it was issued, made, or is dated on a holiday nor shall it be an objection to any bond given by or for any party to an action or taken by an officer in the course of the action that it was made or is dated on any such day.

(b) A summons or order for a provisional remedy may be issued on any holiday, except Sunday. It may be issued on Sunday if an affidavit of the plaintiff or some other person is made to the effect that, unless it is issued on that day, there is reasonable cause to believe that it cannot be executed.

(c) An order of attachment or for the delivery of property or a writ of execution may be issued or executed on any holiday, including Sunday.

(d)(1) A summons, subpoena, notice, order of arrest, or order of injunction may be executed on any holiday except Sunday. It may be executed on Sunday if the officer having the process believes, or an affidavit of the plaintiff or some other person is made to the effect that the affiant believes, that the process cannot be executed after such holiday.

(2) The defendant shall have no privilege of exemption from the service of the process mentioned in subdivision (d)(1) of this section, except from an arrest by reason of his or her attendance at any muster, election, or order of survey or as a witness at any court or other place.

History. Civil Code, §§ 763-767; C. & M. Dig., §§ 1128-1132; Pope's Dig., §§ 1344-1348; A.S.A. 1947, §§ 27-314 — 27-318; Acts 1997, No. 969, § 1.

CASE NOTES

ANALYSIS

Purpose.

Service on sundays.

Purpose.

The legislature meant by this section that in order to permit the service of process on Sunday such service could not be had anywhere within the state after such Sunday. *Waldron Mfg. Corp. v. Kincannon*, 197 Ark. 804, 124 S.W.2d 968 (1939).

Service on Sundays.

As a general rule, service of summons

on Sunday is void and of no effect except in special cases and cases of urgent necessity. *Waldron Mfg. Corp. v. Kincannon*, 197 Ark. 804, 124 S.W.2d 968 (1939).

An affidavit by plaintiff's attorney stating that service could not be had upon defendant after that day, which was Sunday, in the southern district of Logan County, was held insufficient under this statute, as it did not state that the service could not be had in any of the other counties of the state. *Waldron Mfg. Corp. v. Kincannon*, 197 Ark. 804, 124 S.W.2d 968 (1939).

16-58-107. [Superseded.]

Publisher's Notes. Arkansas Rules of Civil Procedure, Rule 4 was amended on February 1, 2001, by revising subsection (a) to permit service only by a person authorized by this rule to serve process and by revising subsection (c) to allow service of process by a sheriff or deputy unless the sheriff is a party to the action. The amendments to Ark. R. Civ. P. 4 were

deemed by the Arkansas Supreme Court to supersede Ark. Code Ann. §§ 16-58-107, 16-58-108, 16-58-109, 16-58-112, 16-58-113, 16-58-118, and 16-58-119.

Section 16-58-107 was derived from Civil Code, § 65 [65A]; Acts 1871, No. 48, § 1 [65a], p. 219; C. & M. Dig., § 1143; Pope's Dig., § 1359; and A.S.A. 1947, § 27-322.

16-58-108. [Superseded.]

Publisher's Notes. Arkansas Rules of Civil Procedure, Rule 4 was amended on February 1, 2001, by revising subsection (a) to permit service only by a person authorized by this rule to serve process and by revising subsection (c) to allow service of process by a sheriff or deputy unless the sheriff is a party to the action. The amendments to Ark. R. Civ. P. 4 were

deemed by the Arkansas Supreme Court to supersede Ark. Code Ann. §§ 16-58-107, 16-58-108, 16-58-109, 16-58-112, 16-58-113, 16-58-118, and 16-58-119.

Section 16-58-108 was derived from Civil Code, § 769; C. & M. Dig., § 1134; Pope's Dig., § 1350; and A.S.A. 1947, § 27-327.

16-58-109. [Superseded.]

Publisher's Notes. Arkansas Rules of Civil Procedure, Rule 4 was amended on February 1, 2001, by revising subsection (a) to permit service only by a person authorized by this rule to serve process and by revising subsection (c) to allow service of process by a sheriff or deputy unless the sheriff is a party to the action.

The amendments to Ark. R. Civ. P. 4 were deemed by the Arkansas Supreme Court to supersede Ark. Code Ann. §§ 16-58-107, 16-58-108, 16-58-109, 16-58-112, 16-58-113, 16-58-118, and 16-58-119.

Section 16-58-109 was derived from Civil Code, § 807 and A.S.A. 1947, § 27-307.

16-58-110. Sheriff to attend clerk's office to receive process.

It shall be the duty of the sheriff or one (1) of his or her deputies to attend at the clerk's office daily, Sundays excepted, to receive any process that may be issued, and the clerk shall deliver to him or her any process remaining in his or her office.

History. Civil Code, § 65; C. & M. Dig., § 1142; Pope's Dig., § 1358; A.S.A. 1947, § 27-320.

Cross References. Sheriff to execute when directed to him, § 14-14-1301.

CASE NOTES

Cited: Henderson v. Dudley, 264 Ark. 697, 574 S.W.2d 658 (1978).

16-58-111. Endorsement of day and hour of receipt on process.

The sheriff shall endorse upon every summons, order of arrest, or order for the delivery of property, or of attachment or injunction in his or her hands the day and hour it was received by him or her.

History. Civil Code, § 776; C. & M. Dig., § 9165; Pope's Dig., § 11827; A.S.A. 1947, § 27-329.

16-58-112. [Superseded.]

Publisher's Notes. Arkansas Rules of Civil Procedure, Rule 4 was amended on February 1, 2001, by revising subsection (a) to permit service only by a person authorized by this rule to serve process and by revising subsection (c) to allow service of process by a sheriff or deputy unless the sheriff is a party to the action. The amendments to Ark. R. Civ. P. 4 were

deemed by the Arkansas Supreme Court to supersede Ark. Code Ann. §§ 16-58-107, 16-58-108, 16-58-109, 16-58-112, 16-58-113, 16-58-118, and 16-58-119.

Section 16-58-112 was derived from Civil Code, § 768; C. & M. Dig., § 1133; Pope's Dig., § 1349; and A.S.A. 1947, § 27-321.

16-58-113. [Superseded.]

Publisher's Notes. Arkansas Rules of Civil Procedure, Rule 4 was amended on February 1, 2001, by revising subsection (a) to permit service only by a person authorized by this rule to serve process and by revising subsection (c) to allow service of process by a sheriff or deputy unless the sheriff is a party to the action. The amendments to Ark. R. Civ. P. 4 were

deemed by the Arkansas Supreme Court to supersede Ark. Code Ann. §§ 16-58-107, 16-58-108, 16-58-109, 16-58-112, 16-58-113, 16-58-118, and 16-58-119.

Section 16-58-113 was derived from Acts 1846, §§ 1-4, p. 86; C. & M. Dig., §§ 1462-1465; Pope's Dig., §§ 1763-1766; and A.S.A. 1947, §§ 27-323 — 27-326.

16-58-114. [Repealed.]

Publisher's Notes. This section, concerning the payment of fee as prerequisite

to service of process, was repealed by Acts 1989, No. 269, § 2. The section was de-

rived from Acts 1875, No. 77, § 22, p. 167;
C. & M. Dig., § 4591; Pope's Dig., § 5679;
A.S.A. 1947, § 27-328.

16-58-115. Sheriff to note time of service.

When a sheriff serves a summons, he or she shall note on the copy of the summons delivered or offered to the defendant or left at the defendant's residence the time and date the summons was served.

History. Acts 1979, No. 364, § 1;
A.S.A. 1947, § 27-322.1.

16-58-116. Acknowledgment of service.

Service may be acknowledged by the defendant by an endorsement upon the summons, signed and dated by him or her, and attested by a witness. The affidavit of the witness shall be proof of the service.

History. Civil Code, § 68; C. & M.
Dig., § 1146; Pope's Dig., § 1362; A.S.A.
1947, § 27-331.

16-58-117. Return.

(a)(1) Each sheriff, coroner, and constable, on the return made by him or her on any writ or other process, shall state at length the time when, the place where, and how the writ or process was served.

(2) Otherwise, the officer shall not be entitled to demand or receive any fee for the service or execution of the writ or other process.

(b)(1) In all cases of the return of service upon a summons by an officer, the return must state the time of service and that a copy was delivered to, or offered and refused by, the defendant.

(2)(A) If a return of service is defective in these respects, the officer may be fined by the court, not exceeding ten dollars (\$10.00), and shall be liable to the action of any person aggrieved by the defect.

(B) However, the court may permit an amendment, according to the truth of the case.

(c) It shall not be a sufficient return of any process that the officer was kept off by force from executing it.

History. Acts 1842, § 25, p. 27; Civil 4625, 9168; Pope's Dig., §§ 1361, 5714,
Code, §§ 67, 779; C. & M. Dig., §§ 1145, 11830; A.S.A. 1947, §§ 27-333 — 27-335.

CASE NOTES

ANALYSIS

In general.
Other county.
Valid return.

Waiver of defects.

In General.

When it appears from a return that no sufficient service has been had, the court

acquires no jurisdiction of the person of the defendant. *Coffee v. Gates & Bro.*, 28 Ark. 43 (1872).

Other County.

The sheriff to whom the writ has been directed from another county is not required to bring it back in person to the office from which it issued, it being sufficient if he endorses a certificate of his proceeding under it and mails it back to the issuing officer. *Bledsoe v. Pierce-Williams Co.*, 147 Ark. 51, 226 S.W. 532 (1921).

Valid Return.

Record made by official endorsement of return is the proper evidence of due service. *Coffee v. Gates & Bro.*, 28 Ark. 43 (1872).

Two returns endorsed on the same day must be considered together; service found defective as the second return did not show that it was left at the usual place of abode with a person over 15 years of age. *Pillow v. Sentelle & Co.*, 39 Ark. 61 (1882).

The return need not follow the exact

language of the statute. *Duval v. Johnson*, 39 Ark. 182 (1882).

Any oral return on an execution made before the justice of the peace who issued the writ does not constitute a valid return. *Jones v. Goodbar*, 60 Ark. 182, 29 S.W. 462 (1895).

Return stating that a copy was left "with a member of his family over 15 years old at his usual place of abode" was sufficient without stating the name of the person with whom the copy was left. *Box v. Equitable Sec. Co.*, 71 Ark. 286, 73 S.W. 100 (1903).

A sheriff's return may be contradicted by evidence accompanying it. *Good Rds. Mach. Co. v. Cox*, 139 Ark. 29, 212 S.W. 87 (1919).

Waiver of Defects.

An answer of a corporation, without preservation of defect in return of service, waived any defect in the return. *O'Guinn Volkswagen, Inc. v. Lawson*, 256 Ark. 23, 505 S.W.2d 213 (1974).

Cited: *Cairo & F.R.R. v. Trout*, 32 Ark. 17 (1877).

16-58-118. [Superseded.]

Publisher's Notes. Arkansas Rules of Civil Procedure, Rule 4 was amended on February 1, 2001, by revising subsection (a) to permit service only by a person authorized by this rule to serve process and by revising subsection (c) to allow service of process by a sheriff or deputy unless the sheriff is a party to the action. The amendments to Ark. R. Civ. P. 4 were

deemed by the Arkansas Supreme Court to supersede Ark. Code Ann. §§ 16-58-107, 16-58-108, 16-58-109, 16-58-112, 16-58-113, 16-58-118, and 16-58-119.

Section 16-58-118 was derived from Acts 1939, No. 314, § 1; 1947, No. 347, § 1; and A.S.A. 1947, §§ 27-610 and 27-612.

16-58-119. [Superseded.]

Publisher's Notes. Arkansas Rules of Civil Procedure, Rule 4 was amended on February 1, 2001, by revising subsection (a) to permit service only by a person authorized by this rule to serve process and by revising subsection (c) to allow service of process by a sheriff or deputy unless the sheriff is a party to the action. The amendments to Ark. R. Civ. P. 4 were deemed by the Arkansas Supreme Court

to supersede Ark. Code Ann. §§ 16-58-107, 16-58-108, 16-58-109, 16-58-112, 16-58-113, 16-58-118, and 16-58-119.

Section 16-58-119 was derived from Civil Code, §§ 77, 78; Acts 1915, No. 290, § 3, p. 1081; 1917, No. 143, § 1, p. 776; C. & M. Dig., §§ 1157, 1158; Pope's Dig., §§ 1374, 1379; Acts 1961, No. 54, § 1; and A.S.A. 1947, § 27-339.

16-58-120. Method of service — Resident and nonresident defendants out of state — Secretary of State agent.

(a) Any cause of action arising out of acts done in this state by an individual in this state or by an agent or servant in this state of a foreign corporation may be sued upon in this state, although the defendant has left this state, by process served upon or mailed to the individual or corporation outside the state.

(b)(1) Any resident or nonresident person who commits acts in this state sufficient to give an individual in this state a cause of action against the person committing the acts shall have deemed to have appointed the Secretary of State as his or her agent for service of process on him or her in any suit arising out of the acts committed by said resident or nonresident.

(2)(A) Service of the process shall be made by:

- (i) Serving three (3) copies of the process on the Secretary of State;
- (ii) Notifying the Secretary of State that service is being effected pursuant to this subsection; and
- (iii) Paying the Secretary of State the sum of twenty-five dollars (\$25.00).

(B) Such service shall be sufficient service upon the nonresident person or any resident person who has subsequently absented himself or herself physically from the state or upon the executor, administrator, or other legal representative of his or her estate, in case he or she has since died, if notice of the service and a copy of the process are forthwith sent by certified mail by the plaintiff or his or her attorney to the defendant at his or her last known address or to the administrator, executor, or other legal representative of the estate in case the person has died, and the defendant's return receipt or the return receipt of the administrator, executor, or other legal representative of the estate of the deceased person is attached to the writ of process and entered and filed in the office of the clerk of the court in which such cases are brought.

(3) The court in which the action is pending may order some continuance as may be necessary to afford the defendant reasonable opportunity to defend the act.

(4) The Secretary of State, upon receiving a copy of the service of summons, shall also forthwith mail a copy of the summons, together with a copy of the complaint, by first-class mail to the last and best known address of the named defendant in the suit, notifying him or her of the filing of the suit.

(c) A defendant so summoned shall have thirty (30) days in which to answer after service upon him or her.

(d) The provisions of this section shall not apply to a corporation that has an agent for service of process registered with the Secretary of State.

History. Acts 1963, No. 119, §§ 1, 2; 1983, No. 167, § 1; A.S.A. 1947, §§ 27-339.1, 27-339.2; Acts 1997, No. 1213, § 1.

RESEARCH REFERENCES

Ark. L. Notes. Gitelman and Watkins, No Requiem for Ricarte: Separation of Powers, the Rules of Evidence, and the Rules of Civil Procedure, 1991 Ark. L. Notes 27.

Ark. L. Rev. Legislative Notes — No. 119 — Personal Jurisdiction Over Out-of-State Defendants, 18 Ark. L. Rev. 124.

Conflict of Laws: Arkansas, 32 Ark. L. Rev. 1.

UALR L.J. Survey of Arkansas Law, Civil Procedure, 1 UALR L.J. 131.

Survey of Arkansas Law, Family Law, 1 UALR L.J. 200.

Survey of Arkansas Law: Family Law, 6 UALR L.J. 159.

CASE NOTES

ANALYSIS

In general.

Applicability.

Evidence.

Reasonableness.

In General.

When an issue of jurisdiction arises under a broad long-arm statute such as this section, the plaintiff must first establish the validity of his substantive cause of action; the complaint must allege facts bringing the case within the long-arm statute and must state a prima facie cause of action and conclusory allegations do not suffice. *Howard v. County Court*, 278 Ark. 117, 644 S.W.2d 256 (1983).

In a divorce action, where service on the husband was attempted by sending the complaint and summons by certified mail to the husband's last known address, but the summons was returned unclaimed, the trial court erred in allowing service by warning order, without the filing of an affidavit that a diligent inquiry had been made into the husband's whereabouts as required by Ark. R. Civ. P. 4(f), and the divorce decree that had been entered was void. *Jackson v. Jackson*, 81 Ark. App. 249, 100 S.W.3d 92 (2003).

Applicability.

This section is not limited to tort actions. *Mallory v. Edmondson*, 257 Ark. 909, 521 S.W.2d 215 (1975).

The acquisition of personal jurisdiction under the "long-arm statute" is not restricted to tort actions but applies to all causes of action arising out of acts done within this state, including divorce, ali-

mony, support, and property division. *Knox v. Knox*, 25 Ark. App. 107, 753 S.W.2d 290 (1988).

Personal jurisdiction over an out-of-state trucking company was not dependent on § 16-4-101 where, at trial, the proof was not in dispute as to the situs of the collision; thus, Arkansas acquired personal jurisdiction over the defendant under this section because the plaintiff's cause of action arose directly from an act committed in this state by the agent of the defendant. *Watkins Motor Lines v. Hedrick*, 316 Ark. 683, 873 S.W.2d 814 (1994).

The plain language of this section requires that the person upon whom service is sought must be one who has subsequently absented himself physically from this state. *Dougherty v. Sullivan*, 318 Ark. 608, 887 S.W.2d 305 (1994).

Evidence.

Evidence insufficient for court to obtain jurisdiction. *Hinson v. Culberson-Stowers Chevrolet, Inc.*, 244 Ark. 853, 427 S.W.2d 539 (1968); *Janni v. Janni*, 271 Ark. 953, 611 S.W.2d 785 (1981); *Howard v. County Court*, 278 Ark. 117, 644 S.W.2d 256 (1983).

Evidence sufficient for court to obtain jurisdiction. *Mallory v. Edmondson*, 257 Ark. 909, 521 S.W.2d 215 (1975); *Bunker v. Bunker*, 261 Ark. 851, 552 S.W.2d 641 (1977).

Reasonableness.

Whether the exercise of jurisdiction on the basis of acts done within this state is reasonable depends on the "basic fairness" test of due process and on consideration of

other factors. *Knox v. Knox*, 25 Ark. App. 107, 753 S.W.2d 290 (1988).

Whether the exercise of jurisdiction on the basis of acts done in this state is reasonable depends upon the facts of each individual case, with the principle factors to be considered being the nature and quality of the acts, the extent of the relationship of the defendant to this state, and the degree of inconvenience which would

result to the defendant by being forced to stand suit in this state. *Jessie v. Jessie*, 53 Ark. App. 188, 920 S.W.2d 874 (1996).

Cited: *White v. Ray*, 267 Ark. 83, 589 S.W.2d 28 (1979); *Franklin v. Griffith*, 282 Ark. 271, 668 S.W.2d 518 (1984); *Young v. Mt. Hawley Ins. Co.*, 864 F.2d 81 (8th Cir. 1988); *Renfro v. Adkins*, 323 Ark. 288, 914 S.W.2d 306 (1996).

16-58-121. Method of service — Nonresident or absent owner, chauffeur, driver, or operator — Survival of action.

(a)(1) The acceptance by a nonresident owner, chauffeur, driver, or operator, or by a resident owner, chauffeur, driver, or operator of any motor vehicle who subsequently absents himself or herself physically from the state, except such nonresident owners or operators, drivers, or chauffeurs as may have a designated agent within this state upon whom valid and binding service of process may be had under the laws of this state, of the rights and privileges conferred by the laws of the State of Arkansas to drive or operate or permit or cause to be operated or driven a motor vehicle upon the public highway, private property, and property owned or controlled by the United States Government within this state as evidenced by his or her or its operating or causing or permitting a motor vehicle to be operated or driven thereon or the operation by a nonresident owner, nonresident operator or chauffeur, or resident owner, operator, or chauffeur subsequently absenting himself or herself from the state, or the causing or permitting by the nonresident owner, nonresident operator or chauffeur or resident owner, resident operator, or chauffeur subsequently absenting himself or herself physically from the state, of a motor vehicle to be operated on the highway, private property, and property owned or controlled by the United States Government within the State of Arkansas shall be deemed equivalent to the appointment by the nonresident owner, nonresident operator, or chauffeur, or by the resident owner, resident operator, or chauffeur subsequently absenting himself or herself from the state, whether the nonresident owner, nonresident operator, or chauffeur or resident owner, resident operator, or chauffeur subsequently absenting himself or herself from the state, is an individual, firm, or corporation, of the Secretary of the State of Arkansas or his or her successor in office to be the true and lawful attorney and agent of the nonresident owner, or nonresident operator, or chauffeur or resident owner, resident operator, or chauffeur subsequently absenting himself or herself from the state upon whom may be served all lawful process in any action or proceedings against him or her against any such person, firm, or corporation, or in the case of death of any such person, against any administrator, executor, or other legal representative of his estate, growing out of any accident or collision in which the nonresident owner, nonresident operator, or chauffeur or resident owner, resident operator,

or chauffeur subsequently absenting himself or herself from the state, or any agent, servant, or employee of any such nonresident owner, nonresident operator, or chauffeur or resident owner, resident operator, or chauffeur subsequently absenting himself or herself from the state, may be involved while operating a motor vehicle on a highway, private property, or property owned or controlled by the United States Government within this state, whether the nonresident operator or chauffeur or resident operator or chauffeur subsequently absenting himself or herself from the state is the owner of the motor vehicle or not.

(2) Such acceptance or operation shall be a signification of the agreement of any such person, firm, or corporation, that any such process against any such person, firm, or corporation, or against the administrator, executor, or other legal representative of the estate of such person who may not have survived in such accident or collision, which is so served shall be of the same legal force and validity as if served on such person, firm, or corporation personally.

(b)(1) Service of the process shall be made by serving a copy of the process on the Secretary of State, notifying the Secretary of State that service is being effected pursuant to this subsection, and paying the Secretary of State the sum of twenty-five dollars (\$25.00). Such service shall be sufficient service upon the nonresident owner, nonresident operator, or chauffeur or upon the resident owner, resident operator, or chauffeur who has subsequently absented himself or herself physically from the state, or upon the executor, administrator, or other legal representative of his or her estate in case he or she has not survived such accident or collision or has since died, if notice of the service and a copy of the process are forthwith sent by registered mail by the plaintiff or his or her attorney to the defendant at his or her last known address or to the administrator, executor, or other legal representative of the estate in the case he or she has not survived the accident or collision or has since died, and notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff or his or her attorney to the defendant at his or her last known address, or to the administrator, executor, or other legal representative of the estate of the deceased wrongdoer or tortfeasor, and the defendant's return receipt, or the return receipt of the administrator, executor, or other legal representative of the estate of the deceased person, or the affidavit of the plaintiff or his or her attorney of compliance herewith are to be appended to the writ of process and entered and filed in the office of the clerk of the court wherein the cause is brought. The Secretary of State, upon receiving a copy of the service of summons shall also forthwith mail a copy of the summons together with a copy of the complaint by first class mail to the last and best known address of the named defendant in the suit, notifying him or her of the filing of the suit.

(2) The court in which the action is pending may order any continuance as may be necessary to afford the defendant reasonable opportunity to defend the action.

(c)(1) Any cause of action arising out of the accident or collision against any person, in the case of the death of that person, shall survive

against his or her administrator, executor, or other legal representative of his or her estate.

(2) Service of summons when obtained upon any such nonresident owner, nonresident operator, or chauffeur; or resident owner, resident operator or chauffeur subsequently absenting himself or herself physically from the state; or his or her executor, administrator, or other legal representative of his or her estate, as provided in this section for the service of process, shall be deemed sufficient service of summons and process to give to any of the courts of this state jurisdiction over the cause of action and over such nonresident owner, nonresident operator, or chauffeur, or resident owner, resident operator, or chauffeur subsequently absenting himself or herself from the state, or the defendant, and shall warrant and authorize personal judgment against such nonresident owner, nonresident operator or chauffeur; resident owner, resident operator, or chauffeur subsequently absenting himself or herself from the state; executor, administrator, or other legal representative of his or her estate; or the defendant in the event that the plaintiff prevails in the action.

History. Acts 1955, No. 38, §§ 1-3; 1959, No. 307, § 23; 1960 (Ex. Sess.), No. 11, § 1; 1963, No. 520, § 1; A.S.A. 1947, §§ 27-342.1 — 27-342.3; Acts 1997, No. 1213, § 2.

Publisher's Notes. As to penalty for violation of Acts 1959, No. 307, see § 27-50-305.

RESEARCH REFERENCES

Ark. L. Rev. Meaning of Term "Public Highway" in Nonresident Motorist Service Act, 7 Ark. L. Rev. 323.

Substituted Service on Resident Owners or Operators of Motor Vehicles, 9 Ark. L. Rev. 390.

Arkansas Nonresident Motorist Service Statute — Actual Notice Necessary, 13 Ark. L. Rev. 381.

Conflict of Laws — Arkansas 1959-64, 18 Ark. L. Rev. 135.

The Uniform Long-Arm Act in Arkansas: The Far Side of Jurisdiction, 22 Ark. L. Rev. 627.

Conflict of Laws — Personal Jurisdiction and the Long-Arm Statute, 24 Ark. L. Rev. 106.

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Conflict of Laws: Arkansas, 1969-72, 27 Ark. L. Rev. 1.

CASE NOTES

ANALYSIS

Constitutionality.

Actual notice.

Attorney/client relationship.

Guardian ad litem.

Invalid service.

Ownership.

Perfection of service.

Second suit.

Standing.

Sufficient compliance.

Survival of action.

Constitutionality.

Former similar section held not unconstitutional upon contention it denies non-resident owners of motor vehicles equal protection of the law and due process. *Highway Steel & Mfg. Co. v. Kincannon*, 198 Ark. 134, 127 S.W.2d 816, appeal dismissed, 308 U.S. 504, 60 S. Ct. 88, 84 L.

Ed. 431 (1939); *Alexander v. Bush*, 199 Ark. 562, 134 S.W.2d 519 (1939) (preceding decisions under prior law).

Actual Notice.

Former similar section required actual notice of the pendency of the action before jurisdiction of the defendant was acquired. *Alexander v. Bush*, 199 Ark. 562, 134 S.W.2d 519 (1939) (decision under prior law).

Service under this section is complete, for purposes of determining prior jurisdiction as between state trial courts, at least when notice is actually received by the defendant or defendants, if not in fact complete prior to that time. *Simmons v. Broomfield*, 163 F. Supp. 268 (W.D. Ark. 1958).

Default judgment invalid where this section not properly complied with. *Jenkins v. Hill*, 240 Ark. 197, 398 S.W.2d 679 (1966); *Halliman v. Stiles*, 250 Ark. 249, 464 S.W.2d 573 (1971).

Attorney/Client Relationship.

Where service was attempted on non-resident defendant under similar former section but copy of summons was sent to attorney who allegedly represented defendant, question of whether an attorney and client relationship existed between defendant and the attorney was a question of fact for the trial judge. *Harris v. Starr*, 226 Ark. 127, 288 S.W.2d 332 (1956) (decision under prior law).

Guardian Ad Litem.

This section is by its terms a personal service statute, therefore appellant's claim that judgment by default was improperly rendered on constructive service because no attorney ad litem was appointed to represent him, and that he had right to have action retried within two years after judgment had no merit. *Agee v. Wildman*, 240 Ark. 111, 398 S.W.2d 542 (1966).

Invalid Service.

Where the plaintiff did not demonstrate that sufficient inquiry was made in attempting to ascertain defendant's last known address and thereby deprived defendant of reasonably probable actual notice consistent with due process, the substitute service statute was not sufficiently complied with and default judgment was void. *Halliman v. Stiles*, 250 Ark. 249, 464 S.W.2d 573 (1971).

Service found to be invalid but the summons itself was not void and an order of dismissal based on this ground was error since it would prevent the service of a properly issued summons by a duly authorized person. *Merriott v. Whitsell*, 251 Ark. 1031, 476 S.W.2d 230 (1972).

Constructive service obtained on motorist under this section was not valid, where there was no allegation that motorist was from outside the state or had absented himself from the state. *Morphew v. Safeco Ins. Co.*, 256 Ark. 809, 510 S.W.2d 543 (1974).

Ownership.

Service on defendant was proper under this section where she signed a statement before the accident, referring to the pickup truck which she turned over to stepson motorist as "my Ford Truck," when she conceded in her brief on appeal that an inference could be made that title was in her name at the time of the accident, and where the certificate of title reflected that 12 days after the accident she transferred title from her deceased husband's estate to herself. *Renfro v. Adkins*, 323 Ark. 288, 914 S.W.2d 306 (1996).

Perfection of Service.

Where nonresident defendant filed a motion to quash summons for the reason that plaintiff did not mail copy of summons and complaint by registered mail, and plaintiff subsequently complied with the statute by mailing the copies by registered mail to the defendant, the motion to quash would be overruled, as service had been perfected. *Fritchey v. Summar*, 86 F. Supp. 391 (W.D. Ark. 1949) (decision under prior law).

Trial court had personal jurisdiction over defendant where service was perfected on the Secretary of State pursuant to this section, notwithstanding the fact that the record did not contain a return of service as proof that service was accomplished, since perfection of service was never contested by defendant. *Renfro v. Adkins*, 323 Ark. 288, 914 S.W.2d 306 (1996).

Second Suit.

Where plaintiff failed to allege defendant was a nonresident and thereafter filed a second suit in which he alleged defendant was a nonresident and defendant filed a motion in the second suit to

quash the return of summons, motion was properly overruled, as second suit superseded first as both suits were the same except for allegation that defendant was a nonresident. *Webb v. Pope County Circuit Court*, 214 Ark. 890, 218 S.W.2d 722 (1949) (decision under prior law).

Standing.

Defendant in action by minor who was injured by motorist who was allegedly encouraged to speed by defendant did not have standing to raise issue of whether the absentee motorist had been properly served under this section. *Cobb v. Indian Springs, Inc.*, 258 Ark. 9, 522 S.W.2d 383 (1975).

Sufficient Compliance.

Service on nonresident operator pursuant to this section is valid, hence part of summons referring to prior statute, which only authorized service against nonresident owner, will be treated as surplus. *Hamlin v. Darr*, 220 Ark. 841, 250 S.W.2d 532 (1952).

Service against nonresident motorist may be obtained under this section in proceeding by tortfeasor against whom judgment was obtained to obtain contribution from other joint tortfeasors. *Burnett v. Agent*, 227 Ark. 1050, 303 S.W.2d 575 (1957).

Survival of Action.

Statutory agency of Secretary of State for service of process was held not to expire upon the death of a nonresident motorist. *Oviatt v. Garretson*, 205 Ark. 792, 171 S.W.2d 287 (1943) (decision under prior law).

Cited: *Simmons v. Broomfield*, 163 F. Supp. 268 (W.D. Ark. 1958); *Aufderhar v. American Employers Ins. Co.*, 331 F.2d 681 (8th Cir. 1964); *Davis v. Schimmel*, 252 Ark. 1201, 482 S.W.2d 785 (1972); *Merriott v. Whitsell*, 251 Ark. 1031, 476 S.W.2d 230 (1972); *Stubbs v. United States*, 593 F. Supp. 521 (E.D. Ark. 1984); *Franklin v. Griffith*, 282 Ark. 271, 668 S.W.2d 518 (1984).

16-58-122. Method of service — Owner or operator of motor buses or trucks.

(a) When the defendant is the owner or operator of any motor bus or buses, motor coach or coaches, or motor truck or trucks engaged in the business of carrying and transporting either passengers, freight, goods, wares, or merchandise over any of the highways of this state, the service of summons may be had upon an owner or operator by serving the summons upon:

(1) Any clerk or agent of the owner or operator selling tickets or transacting any business for the owner or operator; or

(2) Any driver or chauffeur of any bus, coach, or truck being operated or driven by the driver or chauffeur as a servant, agent, or employee of the owner or operator.

(b) Service had upon the agent or agents of an owner or operator or had upon a chauffeur or driver of any bus, coach, or truck being operated or driven by the driver or chauffeur as a servant, agent, or employee of the owner or operator shall be deemed and considered as good and valid service upon the owner or operator whether the owner or operator is a person, firm, or corporation.

(c) Nothing contained in this section shall be so construed as to repeal any provision of the law of this state as to venue or service of summons in effect on February 26, 1935, except where the law may be in direct conflict with the provisions of this section. It is the intention of this section to provide further and additional methods of obtaining service of summons as against the owners and operators of motor buses, coaches, and trucks, as set out in this section.

History. Acts 1935, No. 70, §§ 1, 2; Pope's Dig., §§ 1377, 1378; A.S.A. 1947, §§ 27-343, 27-344.

CASE NOTES

ANALYSIS

Constitutionality.

In general.

Purpose.

Applicability.

Agent.

Compliance with statute.

Question of fact.

Constitutionality.

This section affords due process and is not discriminatory. *Yocum v. Oklahoma Tire & Supply Co.*, 191 Ark. 1126, 89 S.W.2d 919 (1936).

In General.

This section is a service statute only and it did not impair or take away any of the means of service already existing by law. *Missouri Pac. Transp. Co. v. Pipkin*, 199 Ark. 339, 133 S.W.2d 851 (1939).

Purpose.

This section was intended to afford service rights only in those cases where adequate provisions for service had not been made by previous statutes. *Dixie Motor Coach Corp. v. Toler*, 197 Ark. 1097, 126 S.W.2d 618 (1939).

Applicability.

This section is not applicable to service to recover damages sustained by drinking beverage containing foreign substance, where beverage company had no agent or place of business in the county; it applies only to acts for damages to persons or their property occasioned by the negligent operation of motor buses, coaches or trucks. *Coca-Cola Bottling Co. v. Bacon*, 193 Ark. 6, 97 S.W.2d 74 (1936); *Coca-Cola Bottling Co. v. O'Neal*, 193 Ark. 1143, 104 S.W.2d 808 (1937).

This statute was held to apply to action for injuries to passenger forcibly ejected from bus by its driver. *Dixie Motor Coach Corp. v. Toler*, 197 Ark. 1097, 126 S.W.2d 618 (1939).

This section was passed for the purpose of obtaining service on a tortfeasor where service could not have otherwise been obtained in this state on him, and, where

other service is available this section has no application. *Lindley v. Kincannon*, 200 Ark. 772, 140 S.W.2d 1005 (1940).

This section applies to all operators of trucks and buses whether operating on fixed lines or not. *Viking Freight Co. v. Keck*, 202 Ark. 656, 153 S.W.2d 163 (1941).

Agent.

This section was held to authorize service of process upon driver of truck belonging to foreign corporation and used to deliver goods to corporation's customers in county where accident occurred. *Yocum v. Oklahoma Tire & Supply Co.*, 191 Ark. 1126, 89 S.W.2d 919 (1936).

Service of process on the terminal manager of another bus company with whom the defendant bus company contracted for use of its terminal facilities and to sell tickets for it was invalid where the defendant bus company had a superintendent residing in the state and who was registered with the Arkansas Commerce Commission as its resident agent for service of process. *Bullard v. Crown Coach Co.*, 248 Ark. 739, 453 S.W.2d 712 (1970).

Compliance with Statute.

Service of summons was unauthorized as compliance with section insufficient. *Dixie Motor Coach Corp. v. Toler*, 197 Ark. 1097, 126 S.W.2d 618 (1939); *Bryant Truck Lines v. Nance*, 199 Ark. 556, 134 S.W.2d 555 (1939).

In a suit based on alleged negligent operation of defendant's bus, service on agent who sold tickets and maintained a bus station for defendant was sufficient without resort to any of the provisions of this section. *Missouri Pac. Transp. Co. v. Pipkin*, 199 Ark. 339, 133 S.W.2d 851 (1939).

Question of Fact.

Prohibition did not lie to prevent trial of suit against taxicab company upon service on taxi driver under the provisions of this section since whether a taxicab is such a conveyance as is referred to in this act may depend upon a question of fact, to be

determined, in the first instance, by the trial court. *Safeway Cab & Storage Co. v. Kincannon*, 192 Ark. 1019, 96 S.W.2d 7 (1936).

16-58-123. Method of service — Owner or officer of steamboat or watercraft.

When any action to recover judgment against the owners or officers of any steamboat, vessel, or other watercraft for any debt or liability created by them, or either of them, is commenced in any county in which the steamboat, vessel, or watercraft was found and, from any cause the summons or other process cannot be served in the action in the county where that action was commenced, a service in any other county in this state has the same effect as if made in the county where the action was brought.

History. Civil Code, § 76; C. & M. Dig., § 1156; Pope's Dig., § 1373; A.S.A. 1947, § 27-345.

CASE NOTES

Judgment.

A judgment against the owner of a steamboat upon service of process had in another county is void unless the record shows that the steamboat was found in

the county in which the action was commenced. *Ford v. Adams*, 54 Ark. 137, 15 S.W. 186 (1891).

Cited: *Ribelin v. Wilks*, 135 Ark. 599, 205 S.W. 977 (1918).

16-58-124. Method of service — Corporations.

(a) When the defendant is a corporation created by the laws of this state, the service of the summons may be upon the president, mayor, or chairman of the board of trustees. In case of the absence of the above officers, then it may be served upon the cashier, treasurer, secretary, clerk, or agent of the corporation. In case of railroad corporations, it may be served upon any station agent or upon any person who has control of any of the business of that corporation, either as clerk, agent, or otherwise, who as agent or clerk has to report to the corporation who employs him or her. In cases of railroad corporations, a service of a copy of the summons upon the clerk or agent of any station in the county where the summons is issued shall be deemed and considered as a good and valid service.

(b) In the case of a foreign railroad corporation which files its articles of incorporation with the Secretary of State, process shall be served on the agent or agents of the corporation, or upon the agent or agents of the receiver or receivers of the corporation, in the same manner that process is authorized by law to be served on railroad corporations existing under laws of this state. Service upon the agent or agents of any receiver or receivers of any such foreign railroad corporation shall be deemed and considered as good and valid service upon the corporation and upon the receivers thereof.

History. Civil Code, § 69; Acts 1877, No. 56, § 1, p. 59; 1901, No. 106, § 1, p. 171; C. & M. Dig., § 1147; Pope's Dig., § 1363; A.S.A. 1947, § 27-346.

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CASE NOTES

ANALYSIS

Constitutionality.

Administrative orders.

Proper county.

Proper persons.

—Corporations generally.

—Railroad corporations.

Return.

Constitutionality.

A statute prescribing a mode of service of process on a railroad which is different from that provided for in its charter is not void as impairing the obligations of a contract. *Railroad Co. v. Hecht*, 95 U.S. 168, 24 L. Ed. 423 (1877).

Administrative Orders.

Service of an order of an administrative agency can be by mail; there is no requirement that such service comply with the law regarding service of summons. *Arkansas Contractors Licensing Bd. v. F & F Concrete Prods., Inc.*, 297 Ark. 508, 763 S.W.2d 86 (1989).

Proper County.

A domestic corporation must be sued in the county where it has its principal place of business or where its chief officer resides and it can be sued in another county only when it has a branch office therein. *Beal-Doyle Dry Goods Co. v. Odd Fellows Bldg. Co.*, 109 Ark. 77, 158 S.W. 955 (1913).

Service of process in a transitory action against a domestic corporation issuing from a court of the county where the corporation has a branch office and served on the manager of the principal office in another county where the corporation had its principal place of business should have been quashed. *Duncan Lumber Co. v. Bla-*

lock, 171 Ark. 397, 284 S.W. 15 (1926); *Anheuser-Busch, Inc. v. Manion*, 193 Ark. 405, 100 S.W.2d 672 (1937).

Summons served on domestic corporation in county in which it had no office and wherein its chief officer did not reside is invalid. *Chevrolet Motor Co. v. Landers Chevrolet Co.*, 183 Ark. 669, 37 S.W.2d 873 (1931).

Proper Persons.

—Corporations Generally.

Service of summons on subordinate officer of a fraternal insurance order is invalid where the chief officer of the order is within the county at the time. *Knights of Honor v. Epps*, 123 Ark. 371, 185 S.W. 470 (1916).

Employee of drug store who was paid by power company to accept payment and receipt the bills of patrons of the power company in that locality was a proper person to receive service of process for the power company. *Arkansas Power & Light Co. v. Hoover*, 182 Ark. 1065, 34 S.W.2d 464 (1931).

Service on grand master of incorporated lodge was void as he was not one of officers named in the section. *Brick v. Sovereign Grand Lodge*, 196 Ark. 372, 117 S.W.2d 1060 (1938).

Service of writ of process in garnishment proceedings was properly held invalid where return showed delivery of a copy to a vice-president who was not in control of the corporation's business and evidence failed to show that the president was unavailable. *Nutrena Mills, Inc. v. Parsons Feed & Farm Supply, Inc.*, 234 Ark. 1058, 356 S.W.2d 421 (1962).

Where a writ of garnishment was issued on a bank and the sheriff contended that

he served it on a vice-president of the bank but no notation was made on the return that the bank president was not available, the service was invalid. *First Nat'l Bank v. H & M Lumber Co.*, 252 Ark. 175, 477 S.W.2d 850 (1972).

Where a deputy sheriff served a writ of garnishment on a corporation's office manager, who was neither a corporate officer nor the designated agent for process, despite the fact that the corporation's president was in the city on the service day, there was a clear failure to comply with the statutory service requirements of this section; accordingly, a default judgment against the corporation was properly set aside pursuant to ARCP Rule 55(c) and Rule 60 for lack of personal jurisdiction. *Pounders v. Chicken Country, Inc.*, 3 Ark. App. 220, 624 S.W.2d 445 (1981).

Where absence of corporation's president was never shown, service of writ of garnishment on bookkeeper and secretary of corporation would not be proper under this section; under same circumstances, however, service on secretary of the corporation and the bookkeeper, who testified that she was "more or less in charge of the office" at the time of service, would be proper under ARCP 4(d)(5). Since these provisions conflict and this section does not fit into the exception described in ARCP 81(a), ARCP 4(d)(5) supersedes this section. *May v. Bob Hankins Distrib. Co.*, 301 Ark. 494, 785 S.W.2d 23 (1990).

—Railroad Corporations.

Under § 16-55-116(d) and this section, a station agent is the proper person on whom to serve notices on railroads. *Saint Louis & S.F.R.R. v. Hale*, 82 Ark. 175, 100 S.W. 1148 (1907).

A judgment at law against a railroad company against which there was a good defense will not be enjoined in equity if the default judgment was the result of inattention on the part of the station agent of the railroad company upon whom

process was served. *Cazort & McGehee Co. v. St. Louis & S.F.R.R.*, 100 Ark. 395, 140 S.W. 277 (1911).

Service of summons on the conductor of a train passing through the county is not sufficient. *St. Louis-San Francisco Ry. v. Solomon & Weinberg*, 161 Ark. 552, 256 S.W. 862 (1923).

A telegraph operator was agent of a defendant railroad although he was in the employment of another railroad which paid his salary and regularly received and delivered dispatches regarding movements of the defendant's trains and sold tickets for passage thereon. *St. Louis S.W. Ry. v. Steele*, 190 Ark. 662, 80 S.W.2d 623 (1935).

Return.

Return of process served upon an agent of a domestic corporation which does not recite that the president or other chief officer is absent from the county is insufficient. *Arkansas Coal, Gas, Fire-Clay & Mfg. Co. v. Haley*, 62 Ark. 144, 34 S.W. 545 (1896); *Arkansas Constr. Co. v. Mullins*, 69 Ark. 429, 64 S.W. 225 (1901).

An officer's return to a writ of garnishment stating that he delivered a copy thereof to the within named company by delivering to its manager a true and perfect copy is insufficient in failing to show whether the company was a domestic or foreign corporation or a partnership. *Moreno-Burkham Constr. Co. v. Thorpe*, 152 Ark. 550, 237 S.W. 427 (1922).

In an action against a bridge company, where the allegations fail to show whether it is a corporation or a partnership, a return of summons as duly served by handing a copy of it to the bridge company to a named agent in charge of its business in a certain city, was insufficient. *Austin Bridge Co. v. Vaughan*, 178 Ark. 995, 13 S.W.2d 13 (1929).

Return of process may be amended where the proper person was served although his position was misstated. *O'Guinn Volkswagen, Inc. v. Lawson*, 256 Ark. 23, 505 S.W.2d 213 (1974).

16-58-125. Method of service — Corporate agent at branch office.

(a)(1) Any and all foreign and domestic corporations which keep or maintain in any of the counties of this state a branch office or other place of business shall be subject to suits in any of the courts in any of

the counties where the corporation keeps or maintains the office or place of business.

(2) Service of summons or other process of law from any of the courts held in the counties upon the agent, servant, or employee in charge of the office or place of business shall be deemed good and sufficient service upon the corporation and shall be sufficient to give jurisdiction to any of the courts of this state held in the counties where the service of summons or other process of law is had upon the agent, servant, or employee of the corporation.

(b) This section shall not be taken and held by the courts of this state as repealing any of the laws of this state in force on April 1, 1909, and governing and regulating the service of process or summons upon corporations of this state, but shall be by the courts of this state construed and held as cumulative and in aid of the laws of this state in force on April 1, 1909.

History. Acts 1909, No. 98, §§ 1, 2, p. 293; C. & M. Dig., § 1152; Pope's Dig., § 1369; A.S.A. 1947, §§ 27-347, 27-348.

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CASE NOTES

ANALYSIS

Construction.
Applicability.
Corporations.
Insufficiency not apparent.
Office and business.
—Branch office.
—Place of business.
Other laws.
Proper county.
Proper persons.
Return.
Venue.

Construction.

This section is construed to mean that such corporations as mentioned shall be subject to suits in any of the courts of any of the counties, if it keeps or maintains a place where a well-defined line of business is carried on with an agent in charge of

that business. *Harrison v. Swift & Co.*, 200 Ark. 285, 139 S.W.2d 4 (1940).

This section does not repeal any statute relating to service of process but nothing is said to limit its effect upon venue since providing venue in additional counties is certainly cumulative in effect and the section cannot be read to be cumulative only to statutes governing method of service. *American Sav. & Loan Ass'n v. Enfield*, 261 Ark. 796, 551 S.W.2d 552 (1977).

Applicability.

Defendants contending that this statute, rather than § 16-60-108, is the applicable statute could not prevent a trial for want of jurisdiction where the jurisdiction depended on questions of fact. *Millsap v. Williams*, 236 Ark. 416, 366 S.W.2d 705 (1963).

Corporations.

Because the buyer failed to produce any

facts to support its venue argument, and because this section and § 16-58-116 supported venue for the action in Cleburne County, the trial court correctly denied the buyer's motion to dismiss on the basis of venue. *Ison Props., LLC v. Wood*, 85 Ark. App. 443, 156 S.W.3d 742 (2004).

Insufficiency Not Apparent.

Where alleged lack of service on foreign corporation is not apparent upon the face of the records but arose upon presentation of evidence of certain factual conditions and legal effect of the facts, writ of prohibition to prevent trial was denied. *Simms Oil Co. v. Jones*, 192 Ark. 189, 91 S.W.2d 258 (1936).

Office and Business.

The words "branch office" and "other place of business" are not synonymous; branch office designates a place where business is transacted similar to that where the principal office is situated. *Fort Smith Lumber Co. v. Shackleford*, 115 Ark. 272, 171 S.W. 99 (1914).

A foreign corporation need not own or rent the building in which it conducts its business to authorized service on the agent in charge. *Ramey v. Baker*, 182 Ark. 1043, 34 S.W.2d 461 (1931).

Service on domestic corporation in county in which it had no branch office or other place of business was invalid. *Chevrolet Motor Co. v. Landers Chevrolet Co.*, 183 Ark. 669, 37 S.W.2d 873 (1931).

—Branch Office.

In an action against a foreign corporation, service of summons in a county where the company maintains a branch office is sufficient. *Mississippi River Fuel Corp. v. Senn*, 184 Ark. 554, 43 S.W.2d 255 (1931).

Contract action could only be brought where corporation maintained branch. *Mayner v. Utah Constr. Co.*, 108 F. Supp. 532 (W.D. Ark. 1952).

—Place of Business.

Establishment of place of business found. *Arkansas Power & Light Co. v. Hoover*, 182 Ark. 1065, 34 S.W.2d 464 (1931); *Cook v. Malvern Brick & Tile Co.*, 194 Ark. 759, 109 S.W.2d 451 (1937); *Public Loan Corp. v. Stanberry*, 224 Ark. 258, 272 S.W.2d 694 (1954); *Brandon v. Memphis Publishing Co.*, 194 F. Supp. 376 (E.D. Ark. 1961).

In action for injuries by passenger forcibly ejected from defendant's bus, filing of action in county other than the one where defendant maintained a place of business and service of summons on bus driver was unauthorized. *Dixie Motor Coach Corp. v. Toler*, 197 Ark. 1097, 126 S.W.2d 618 (1939).

Plaintiff did not secure jurisdiction of defendant corporation by service of process on the corporation in county where defendant had principal place of business, where suit was filed in county wherein defendant had no officers or place of business at all. *Concrete, Inc. v. Arkhola Sand & Gravel Co.*, 228 Ark. 1016, 311 S.W.2d 770 (1958).

Other Laws.

This section was not affected by § 16-58-122(a) and (b). *Dixie Motor Coach Corp. v. Toler*, 197 Ark. 1097, 126 S.W.2d 618 (1939); *Missouri Pac. Transp. Co. v. Pipkin*, 199 Ark. 339, 133 S.W.2d 851 (1939).

Rule 4 A.R.C.P. did not supersede this section. *Sun Gas Liquids Co. v. Helena Nat'l Bank*, 276 Ark. 173, 633 S.W.2d 38 (1982).

Proper County.

Where transitory action against domestic corporation was brought in county in which it maintained a branch, service should have been upon the agent in that county, and not on the general manager of the corporation in the county in which the corporation maintained its principal office. *Duncan Lumber Co. v. Blalock*, 171 Ark. 397, 284 S.W. 15 (1926), overruled on other grounds, *Anheuser-Busch, Inc. v. Manion*, 193 Ark. 405, 100 S.W.2d 672 (1937).

Service on agent in charge of branch office may be at any place he may be found in the county. *Black Springs Lumber Co. v. Palmer*, 192 Ark. 1032, 96 S.W.2d 469 (1936).

Where action against foreign corporation was brought in one county under this section, service of process on designated agent for service in another county was invalid. *Anheuser-Busch, Inc. v. Manion*, 193 Ark. 405, 100 S.W.2d 672 (1937).

Proper Persons.

Person found to be agent upon whom process could be properly served. *Terry Dairy Co. v. Parker*, 144 Ark. 401, 223 S.W.

6 (1920); *Riggs v. Clay County Burial Ass'n*, 192 Ark. 994, 96 S.W.2d 4 (1936); *Missouri Pac. Transp. Co. v. Pipkin*, 199 Ark. 339, 133 S.W.2d 851 (1939); *Public Loan Corp. v. Stanberry*, 224 Ark. 258, 272 S.W.2d 694 (1954); *Arkansas Indep. Oil Marketers Ass'n v. Monsanto Chem. Co.*, 225 Ark. 620, 284 S.W.2d 127 (1955); *Interstate Fire Ins. Co. v. Tolbert*, 233 Ark. 249, 343 S.W.2d 784 (1961).

Person found not to be agent of the corporation upon whom process could be properly served within this statute where shipments were made f.o.b. and products handled became the property of the distributor. *Anheuser-Busch, Inc. v. Manion*, 193 Ark. 405, 100 S.W.2d 672 (1937); *International Paper Co. v. Aud*, 210 Ark. 425, 196 S.W.2d 578 (1946).

The requirement that service be made upon the person in charge of the corporate office or business is mandatory. *Morgan v. National Pizza Co.*, 285 Ark. 61, 684 S.W.2d 812 (1985).

An order setting aside the judgment against a garnishee was appealable to the Supreme Court only because the appeal involved the interpretation or construction of this section which establishes the requirements for services of process upon a corporate agent at a branch office. *Morgan v. National Pizza Co.*, 285 Ark. 61, 684 S.W.2d 812 (1985).

Return.

Sheriff's return showing service on defendant's agent without allegation that defendant maintained an office or other place of business in the county and not showing that summons was served upon an agent in charge of an office or other place of business, was insufficient to show valid service in action. *Sloan v. Peoples Loan & Inv. Co.*, 195 Ark. 1085, 115 S.W.2d 833 (1938).

Venue.

This section governs venue and clearly states that venue in an action against a domestic corporation can be laid in any county where the corporation maintains a branch office and that service of summons from any court held in the county upon the person in charge of the office is sufficient to give the court jurisdiction. *American Sav. & Loan Ass'n v. Enfield*, 261 Ark. 796, 551 S.W.2d 552 (1977).

Cited: *Fort Smith Lumber Co. v. Shackelford*, 115 Ark. 272, 171 S.W. 99 (1914); *Arkansas Valley Indus., Inc. v. Roberts*, 244 Ark. 432, 425 S.W.2d 298 (1968); *Cavette v. Ford Motor Credit Co.*, 260 Ark. 874, 545 S.W.2d 612 (1977); *Porter Foods, Inc. v. Brown*, 281 Ark. 148, 661 S.W.2d 388 (1983); *Zolper v. AT & T Info. Sys.*, 289 Ark. 27, 709 S.W.2d 74 (1986).

16-58-126. Method of service — Corporations — Secretary of State.

Whenever process in any suit against a domestic corporation cannot be served in the county of the corporation's domicile upon any officer authorized to be served with process by the laws of the state and this fact is made to appear by the return of the sheriff of the county upon summons directed to the officer, the process may be served on the Secretary of State. He or she shall immediately send the process served on him or her to the corporation at its place of domicile by mail. The service shall be as valid as if served on an officer of the corporation authorized to be served with process. The service shall date from the time of service upon the Secretary of State.

History. Acts 1915, No. 290, § 22; C. & M. Dig., § 1148; Pope's Dig., § 1364; A.S.A. 1947, § 27-349.

16-58-127. Method of service — Foreign corporations.

Where the defendant is a foreign corporation having an agent in this state, the service may be upon the agent.

History. Civil Code, § 72; C. & M. Dig., § 1151; Pope's Dig., § 1368; A.S.A. 1947, § 27-350.

CASE NOTES

ANALYSIS

Agent.
Constructive service.
Federal courts.
Out-of-state injury.

Agent.

Process against a foreign corporation may be served upon an agent of the corporation residing within the county of the venue where the agent was in control of the business of the corporation in the county, although the corporation had designated an agent residing elsewhere in the state upon whom process might be served. *Lesser Cotton Co. v. Yates*, 69 Ark. 396, 63 S.W. 997 (1901).

Whether the actions of an agent of a foreign corporation are sufficient to constitute him an agent for service is a question for the trial court. *Hot Springs Sch. Dist. No. 6 v. Surface Combustion Corp.*, 222 Ark. 591, 261 S.W.2d 769 (1953).

Person found to be agent upon whom process could be properly served. *Public Loan Corp. v. Stanberry*, 224 Ark. 258, 272 S.W.2d 694 (1954); *Brandon v. Memphis Publishing Co.*, 194 F. Supp. 376 (E.D. Ark. 1961); *Interstate Fire Ins. Co. v. Tolbert*, 233 Ark. 249, 343 S.W.2d 784 (1961); *Bullard v. Crown Coach Co.*, 248 Ark. 739, 453 S.W.2d 712 (1970).

Where employee of foreign corporation is clothed with the power to hire and fire employees and pay their wages, to endorse checks made out to corporation that are received by him, and where the em-

ployee is supplied with living quarters and works no set hours but puts in as much time as he sees fit, the employee is an agent of foreign corporation upon whom service may be had under this section. *Keith v. Cave Springs*, 233 Ark. 363, 344 S.W.2d 591 (1961).

Constructive Service.

A foreign corporation having designated an agent upon whom process might be served in actions against it could be proceeded against only by personal service on its agent or some other agent in the state acting for it and not by constructive service. *Sinclair Ref. Co. v. Bounds*, 198 Ark. 149, 127 S.W.2d 629 (1939).

Federal Courts.

This section did not confer jurisdiction on federal court over foreign corporation in claim which grew out of interstate transaction asserted by another foreign corporation against it. *McAvoy v. Texas E. Transmission Corp.*, 185 F. Supp. 784 (W.D. Ark. 1960).

Out-of-State Injury.

An action for personal injuries to a nonresident received in another state is maintainable in this state against a foreign railroad operating a line in this state if based on service on an authorized agent in this state. *Yockey v. St. Louis-San Francisco Ry.*, 183 Ark. 601, 37 S.W.2d 694 (1931).

Cited: *Zolper v. AT & T Info. Sys.*, 289 Ark. 27, 709 S.W.2d 74 (1986).

16-58-128. [Repealed.]

Publisher's Notes. This section, concerning the method of service on a bank, was repealed by Act 2005, No. 426, § 2. The section was derived from Civil Code,

§ 70; C. & M. Dig., § 1149; Acts 1931, No. 42, § 1; Pope's Dig., §§ 1365, 1366; A.S.A. 1947, §§ 27-351, 27-352.

16-58-129. Method of service — Insurance company.

Where the defendant is an incorporated insurance company and the action is in a county in which there is an agency of the company, the service may be upon the chief officer of the agency.

History. Civil Code, § 71; C. & M. Dig., § 1150; Pope's Dig., § 1367; A.S.A. 1947, § 27-353.

RESEARCH REFERENCES

Ark. L. Notes. Gitelman and Watkins, Rules of Civil Procedure, 1991 Ark. L. No Requiem for Ricarte: Separation of Powers, the Rules of Evidence, and the Notes 27.

CASE NOTES

Agent.

Service of summons on a foreign insurance company's general agent for service was held to give jurisdiction to the court in another county wherein the company had

a local agent. *Pacific Mut. Life Ins. Co. v. Henry*, 188 Ark. 262, 65 S.W.2d 32 (1933); *Mutual Benefit Health & Accident Ass'n v. Kincannon*, 202 Ark. 1128, 155 S.W.2d 687 (1941).

16-58-130. Constructive service — Warning orders.

(a) The circuit clerk shall make and file with the papers in the case an order warning the defendant to appear in the action within thirty (30) days from the time of making the order:

(1) Where it appears by the affidavit of the plaintiff, filed in the clerk's office at or after the commencement of the action, that he or she had made diligent inquiry and that it is his information and belief that the defendant:

(A) Is a foreign corporation, having no agent in this state; or

(B) Is a nonresident of this state; or

(C) Has departed from this state with intent to delay or defraud his creditors; or

(D) Has been absent from this state four (4) months; or

(E) Has left the county of his or her residence to avoid the service of a summons; or

(F) Conceals himself or herself so that a summons cannot be served upon him or her; or

(2) Where either of the facts mentioned in subdivisions (a)(1)(E) and (F) of this section is stated in the return, by the proper officer of a summons against the defendant.

(b) In an action against the heirs of a deceased person as unknown heirs or against other persons made defendants as unknown owners of any property to be divided or disposed of in the action, where it appears by the complaint that the names of the heirs, or any of them, of such other persons are unknown to the plaintiff, a warning order, as directed in subsection (c) of this section, shall be made by the clerk against the unknown heirs or owners.

(c) The court may make the warning order upon the requisite facts being satisfactorily shown by affidavit or other proof. Warning orders shall be published weekly for at least two (2) weeks. The warning order shall be published in a newspaper of general circulation in the county in which the court is held.

(d) A defendant against whom a warning order has been made and published, upon completion of the publication of the warning order for the two (2) weeks required by law, shall be deemed to have been constructively summoned upon the date of the making of the order.

(e) The plaintiff may, at any time before judgment, have a summons served on the defendant, if found in this state, although a warning order may have been previously entered against him. After service the case shall proceed as in other cases of actual service.

(f) No lien on the property of a defendant constructively summoned shall be created otherwise than by an attachment, as provided in Chapter III of Title VIII of the code, or by judgment. Nor shall any other defendant be restrained from paying or delivering any money or property into his hands belonging or due to the defendant, by notice endorsed on the summons, or otherwise than by attachment or judgment.

History. Civil Code, §§ 79-83, 454; Acts 1871, No. 48, § 1 [80], p. 219; 1915, No. 290, §§ 4, 5; C. & M. Dig., §§ 1159-1163, 6269; Pope's Dig., §§ 1380-1384, 8225; A.S.A. 1947, §§ 27-354 — 27-359; Acts 1991, No. 199, § 1.

Publisher's Notes. Subsection (b) of

this section may be superseded by ARCP 4(f).

Chapter III of Title VIII of the code referred to in this section means §§ 216-291 of the Code of Practice in Civil Cases of 1869. See parallel reference tables in the tables volume.

RESEARCH REFERENCES

Ark. L. Notes. Gitelman and Watkins, No Requiem for Ricarte: Separation of Powers, the Rules of Evidence, and the Rules of Civil Procedure, 1991 Ark. L. Notes 27.

UALR L.J. Survey — Civil Procedure, 14 UALR L.J. 747.

CASE NOTES

ANALYSIS

Construction.
Action to quiet title.
Commencement of suit.
Compliance.
Corporations.
Diligent inquiry.
Judgment against garnishee.
Nonresident insane persons.
Sufficiency of affidavit.
Unknown heirs.
Warning order published.

Construction.

To the extent subsection (c) formerly provided a different and longer publication requirement than ARCP Rule 4(f) and (j), (c) was preempted by Rule 4. Phillips v. Commonwealth Sav. & Loan Ass'n, 308

Ark. 654, 826 S.W.2d 278 (1992) (decision prior to 1991 amendment).

Action to Quiet Title.

In actions to quiet title nonresidents must be served as provided by subsection (a). Frank v. Frank, 175 Ark. 285, 298 S.W. 1026 (1927).

Something more than the mere publication of a warning order is required in subjecting a nonresident or his interest in land to the jurisdiction of the court under a proceeding to quiet and confirm title. Ingram v. Luther, 244 Ark. 260, 424 S.W.2d 546 (1968).

Commencement of Suit.

A suit based on constructive service is commenced when the proceedings provided for in subsections (a) and (c) have been complied with. Boynton v. Chicago

Mill & Lumber Co., 84 Ark. 203, 105 S.W. 77 (1907).

In case of constructive service, a suit is not commenced until a complaint is filed and an order is made by the clerk warning the nonresident defendants to appear. *Frank v. Frank*, 175 Ark. 285, 298 S.W. 1026 (1927).

Action can be said to be commenced or cause pending against a nonresident defendant where certified copy of complaint and warning order, based on plaintiff's affidavit of defendant's nonresidence, are served upon the defendant by some person to whom he is personally known. *Swartz v. Drinker*, 192 Ark. 198, 90 S.W.2d 483 (1936).

Suit held not commenced where plaintiff had only filed complaint. *Walters v. Burnett*, 228 Ark. 1064, 312 S.W.2d 344 (1958).

Compliance.

Writ of garnishment will not issue unless full compliance has been made with the terms of subsection (a). *Missouri Pac. R.R. v. McLendon*, 185 Ark. 204, 46 S.W.2d 626 (1932).

Strict compliance with statutory requirements for service upon nonresident defendant is required, and absent compliance no action is pending. *Swartz v. Drinker*, 192 Ark. 198, 90 S.W.2d 483 (1936).

In a divorce action, where service on the husband was attempted by sending the complaint and summons by certified mail to the husband's last known address, but the summons was returned unclaimed, the trial court erred in allowing service by warning order, without the filing of an affidavit that a diligent inquiry had been made into the husband's whereabouts as required by Ark. R. Civ. P. 4(f), and the divorce decree that had been entered was void. *Jackson v. Jackson*, 81 Ark. App. 249, 100 S.W.3d 92 (2003).

Corporations.

For the purpose of personal or constructive service, foreign corporation licensed to do business and doing business in this state with a designated agent is in the same position as a domestic corporation. *Sinclair Ref. Co. v. Bounds*, 198 Ark. 149, 127 S.W.2d 629 (1939).

Diligent Inquiry.

Diligent inquiry not found. *Bauer v.*

Brown, 129 Ark. 125, 194 S.W. 1025 (1917).

The affidavit for a warning order was held to be sufficient since diligent inquiry is not necessary where the defendant is a nonresident and the plaintiff knows his whereabouts. *Willard v. Willard*, 134 Ark. 197, 203 S.W. 1019 (1918).

Judgment Against Garnishee.

Rule that judgment cannot be rendered against a garnishee until there is a judgment against the debtor was held not applicable to creditor's suit based on foreign judgment. *Miller v. Maryland Cas. Co.*, 207 Ark. 312, 180 S.W.2d 581 (1944).

Nonresident Insane Persons.

Nonresident insane persons can be served in property action by publication under subsections (a) and (c) without personal service. *Dabbs v. Dabbs*, 224 Ark. 699, 276 S.W.2d 73 (1955).

Sufficiency of Affidavit.

Affidavit found insufficient to justify the issuance of a warning order. *Holloway v. Holloway*, 85 Ark. 431, 108 S.W. 837 (1908); *J.H. Hamlen & Son v. Allen*, 186 Ark. 1104, 57 S.W.2d 1046 (1933); *Sinclair Ref. Co. v. Bounds*, 198 Ark. 149, 127 S.W.2d 629 (1939).

A complaint and an affidavit endorsed upon it may be treated as one instrument in determining whether the necessary essentials are set forth to warrant the issuance of a warning order by the clerk of the court. *Harding Constr. Co. v. Drainage Dist. No. 17*, 178 Ark. 778, 13 S.W.2d 312 (1929).

Court found that proper constructive service was had on defendants where the decree recited "that the defendants were served either personally or constructively of the time and in the manner required by law, and the court had jurisdiction of the parties and the subject matter." *May v. National Bank*, 231 Ark. 588, 331 S.W.2d 697 (1960).

Where, subsequent to husband's filing of affidavit for a warning order on the basis that wife was a nonresident, the wife again became a resident of the state before the expiration of 30 days from the appointment of an attorney ad litem, husband's affidavit for a warning order lost its efficacy for the purpose of giving divorce court jurisdiction of the parties. *Pierce v.*

Pierce, 259 Ark. 312, 532 S.W.2d 747 (1976).

Unknown Heirs.

Proceedings against unknown heirs are strictly construed. *Felkner v. Tighe*, 39 Ark. 357 (1882).

Subsection (b) requires that it must be alleged in the complaint that the names of the heirs are unknown, and it is not sufficient to make the allegation in a separate affidavit or in the caption of the complaint. *McMahan v. Smith*, 69 Ark. 591, 65 S.W. 459 (1901).

An averment in the complaint to the effect that the names of certain heirs are unknown to the plaintiff is indispensable to a warning order and service on the heirs, and a decree based on order and service without such averment is void. *Indiana & Ark. Lumber & Mfg. Co. v. Brinkley*, 164 F. 963 (8th Cir. 1908).

Subsection (b) does not apply to parties whose names and whose interest in land appeared in the record of the county, so that their whereabouts could be ascertained. *Bartel v. Ingram*, 178 Ark. 699, 11 S.W.2d 488 (1928).

Warning Order Published.

Subsection (c) must be strictly followed in obtaining and publishing warning order. The order must contain all the recitals required by law and the affidavits of publication must be made by the editor or

publisher and show publication for four successive weeks. *Lawrence v. State*, 30 Ark. 719 (1875).

Notice and appearance held sufficient where published warning order was indefinite as to place where plaintiff was to appear. *Williams v. Ewing & Fanning*, 31 Ark. 229 (1876).

An affidavit of the publication of a warning order must show that the affiant was the editor, publisher, proprietor, or principal accountant and must show that the order was published weekly four times. *Pillow v. Sentelle & Co.*, 39 Ark. 61 (1882).

Until the warning order has been made and published for four weeks, there has been no service. *Frank v. Frank*, 175 Ark. 285, 298 S.W. 1026 (1927).

Where a complaint in a suit named certain nonresidents as defendants but no warning order was ever published, no suit was commenced. *Frank v. Frank*, 175 Ark. 285, 298 S.W. 1026 (1927).

When constructive notice only is given, the requirements of this subsection (c) must be strictly complied with, and where essential statutory provisions governing service by publication are not strictly complied with as to nonresident defendants, all proceedings as to them are void. *Roswell v. Driver*, 268 Ark. 819, 596 S.W.2d 352 (Ct. App. 1980).

Cited: *Burton v. Sanders*, 230 Ark. 67, 321 S.W.2d 209 (1959); *Davis v. Schimmel*, 252 Ark. 1201, 482 S.W.2d 785 (1972).

16-58-131. [Superseded].

Publisher's Notes. This section has been deemed superseded by the Arkansas Supreme Court in light of its January 28, 1999 amendment of ARCP 5. For the text of the amendment, please consult the February issue of the Arkansas Court Rules

Newsletter (LEXIS Law Publishing, 1999) or the Court Rules Volume.

Section 16-58-131 was derived from Acts 1963, No. 67, §§ 1-5; 1975, No. 304, § 1; and A.S.A. 1947, §§ 27-360 — 27-364.

16-58-132. Refusal to accept process served by mail.

Where service of summons, process, or notice is provided for or permitted by registered or certified mail, under the laws of Arkansas, and the addressee refuses to accept delivery, and it is so stated in the return receipt of the United States Postal Service, the written return receipt, if returned and filed in the action, shall be deemed an actual and valid service of the summons, process, or notice.

History. Acts 1979, No. 446, § 1; A.S.A. 1947, § 27-365.

16-58-133. [Superseded.]

A.C.R.C. Notes. The Supreme Court of Arkansas stated, in its per curiam of Dec. 21, 1987, that this section was superseded by ARCP 72.

16-58-134. Time limit for service.

If service of the summons is not made upon a defendant within one hundred twenty (120) days after the filing of the complaint, the action may be dismissed as to that defendant without prejudice upon motion or upon the court's initiative. If a motion to extend is made anytime before the court enters a dismissal without prejudice, the time for service may be extended by the court upon a showing of good cause. If service is made by mail pursuant to this rule, service shall be deemed to have been made for the purpose of this provision as of the date on which the process was accepted or refused. This paragraph shall not apply to service in a foreign country pursuant to Arkansas Rules of Civil Procedure Rule 4(e) or to complaints filed against unknown tortfeasors.

History. Acts 1989, No. 401, § 1.

§ 1, codified as this section, purported to amend ARCP 4(i).

A.C.R.C. Notes. Acts 1989, No. 401,

RESEARCH REFERENCES

Ark. L. Notes. Gitelman and Watkins, No Requiem for Ricarte: Separation of Powers, the Rules of Evidence, and the Rules of Civil Procedure, 1991 Ark. L. Notes 27.

UALR L.J. Survey, Civil Procedure, 12 UALR L.J. 603.

Survey, Civil Procedure, 13 UALR L.J. 321.

CHAPTER 59**LIS PENDENS****SECTION.**

- 16-59-101. Filing of notice required to constitute constructive notice of pending action.
 16-59-102. Contents of notice.
 16-59-103. Duty of recorder of deeds.
 16-59-104. Index of notices.

SECTION.

- 16-59-105. Fees of recorder — Taxing as costs.
 16-59-106. Accounts due state lien from commencement of action.
 16-59-107. Copy of notice as evidence.

Effective Dates. Acts 1965 (2nd Ex. Sess), No. 5, § 2: Nov. 6, 1965. Emergency clause provided: "It has been found and is hereby declared by the General Assembly of the State of Arkansas that Arkansas' present Lis Pendens Statute does not expressly authorize the county recorder of deeds to accept, file, record and index a lis pendens notice of an action pending in a

United States District Court within this State, as permitted by an Act of Congress, 28 U.S.C. Section 1964; therefore an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety, shall be in full force and effect from and after the date of its passage and approval."

RESEARCH REFERENCES

ALR. Cancellation prior to termination of underlying action, absent claim of delay. 49 ALR 4th 242.

Am. Jur. 51 Am. Jur. 2d, Lis Pen., § 1 et seq.

Ark. L. Rev. Creditors' Provisional Remedies and Debtors' Due Process Rights: Statutory Liens in Arkansas, 32 Ark. L. Rev. 185.

C.J.S. 54 C.J.S., Lis Pen., § 1 et seq.

UALR L.J. Note, Bankruptcy — A Fraudulent Conveyance Action and a Lis Pendens May Create a Lien Which Survives a Bankruptcy Discharge, 15 UALR L.J. 319.

16-59-101. Filing of notice required to constitute constructive notice of pending action.

To render the filing of any suit at law or in equity in either a state court or United States district court affecting the title or any lien on real estate or personal property constructive notice to a bona fide purchaser or mortgagee of any such real estate or personal property, it shall be necessary for the plaintiff or any one (1) of the plaintiffs, if there is more than one (1) plaintiff, or his or her attorney or agent to file a notice of the pendency of the suit, for record with the recorder of deeds of the county in which the property to be affected by the constructive notice is situated.

History. Acts 1903, No. 65, § 1, p. 118; Acts 1965 (2nd Ex. Sess.), No. 5, § 1; C. & M. Dig., § 6979; Pope's Dig., § 8959; A.S.A. 1947, § 27-501.

CASE NOTES

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Conversion.
Effect of filing.
Estoppel.
Failure to record.
Judgment creditors.
Notice void.
Purchase by spouse.
Specific performance.
Tenants.
Transfer.

Purpose.

The notice of lis pendens is for the purpose of preserving rights pending the litigation. *Mitchell v. Federal Land Bank*, 206 Ark. 253, 174 S.W.2d 671 (1943).

Applicability.

This section applies only to actions affecting titles and liens on real estate or personal property, not to actions seeking a money judgment. *Tolley v. Wilson*, 212 Ark. 163, 205 S.W.2d 177 (1947); *Health Betterment Found. v. Thomas*, 225 Ark. 529, 283 S.W.2d 863 (1955).

Actual Knowledge.

Where all the parties interested in a purchase of land have actual knowledge of the condition of the title, this section has no application. *Zeigler v. Daniel*, 128 Ark. 403, 194 S.W. 246 (1917).

Purchaser with actual notice is bound notwithstanding failure to give lis pendens notice. *Drummond v. Batson*, 162 Ark. 407, 258 S.W. 616 (1924).

One who purchases, having actual notice of the pendency of a suit to foreclose a mortgage, cannot avail himself of the failure to give the lis pendens notice required

by the section. *Shouse v. Scovill*, 200 Ark. 441, 139 S.W.2d 240 (1940).

One who acquires from a party property in litigation in a court having jurisdiction, takes it subject to the rights of the parties and has the same rights as the grantee, and is conclusively bound by the results of the litigation. *White River Prod. Credit Ass'n v. Fears*, 213 Ark. 75, 209 S.W.2d 294 (1948).

Appeals.

Purchaser at a judicial sale based upon a decree which on appeal was declared void was entitled to recover value of improvements made while the appeal was pending. *McDonald v. Rankin*, 92 Ark. 173, 122 S.W. 88 (1909).

The purpose of a *lis pendens* is to put bona fide purchasers or mortgagees upon notice that the title to certain real or personal property is being litigated and litigation is obviously not completed until appellate review is had in cases where appeals are perfected; the statutory effect of a *lis pendens* follows the litigation to its conclusion. *Ashworth v. Hankins*, 241 Ark. 629, 408 S.W.2d 871 (1966).

Complaint for Money Judgment.

Only the filing of a *lis pendens* against the property can render the complaint a matter of record before it is reduced to judgment, but *lis pendens* cannot be filed for a complaint merely for a money judgment and not directly affecting the title to the real estate. *Bank of Cave City v. Abstract & Title Co.*, 38 Ark. App. 65, 828 S.W.2d 852 (1992).

Conversion.

A lienholder may protect himself against an actionable conversion of property to which his lien attaches which has not occurred at the time he files his foreclosure suit by filing a notice of *lis pendens*, and if the property is thereafter converted by a stranger to the case that person would take subject to the outcome of the foreclosure litigation. *Superior Iron Works & Supply Co. v. Saulsberry*, 226 Ark. 1032, 295 S.W.2d 626 (1956).

Effect of Filing.

A general creditor who files an action to cancel a fraudulent conveyance of a debtor acquires a specific lien on the property conveyed, including lien on real property when notice of *lis pendens* is filed. *Clark v.*

Bank of Bentonville, 308 Ark. 241, 824 S.W.2d 358 (1992).

Recording of the notice of *lis pendens* under this section was itself a "transfer" within the meaning of 11 U.S.C.S. § 547, which transfer occurred when the notice was recorded; thus, the transfers by the filing of the *lis pendens* filings on two properties were effective when recorded, occurred within 90 days of the debtor's bankruptcy filing, and were avoided by the bankruptcy trustee. *Rice v. First Ark. Valley Bank (In re May)*, 310 B.R. 405 (Bankr. E.D. Ark. 2004).

Estoppel.

Where evidence established that a party accepted and treated as his own, land that had been awarded to another person in severalty in a partition suit, and when the party treated the tract of land as his own property, he thereby estopped himself from claiming an undivided interest in the entire tract from which the property had been subdivided in the partition suit. *Crain v. Foster*, 230 Ark. 190, 322 S.W.2d 443 (1959).

Failure to Record.

Failure of a bona fide purchaser to record his title before a *lis pendens* notice was filed will not deprive him of his title or give the plaintiff any superior title. *Oil Fields Corp. v. Dashko*, 173 Ark. 533, 294 S.W. 25, cert. denied, 275 U.S. 548, 48 S. Ct. 85, 72 L. Ed. 419 (1927).

Judgment Creditors.

Where order of dismissal was final determination of mortgage foreclosure suit filed seven years earlier with notice of *lis pendens*, and it reinstated the mortgage in full force and effect as though no suit had been filed, the order was binding on judgment creditors of mortgagor who secured judgment after beginning of suit and precluded them from contending that subsequent foreclosure suit was barred by limitations for failure to make marginal endorsements of payment within five years. *Mitchell v. Federal Land Bank*, 206 Ark. 253, 174 S.W.2d 671 (1943).

Notice Void.

One who purchases land from one in possession thereof without notice, either actual or constructive, of the pendency of an action against the seller to recover the land is not concluded by a judgment ren-

dered therein against the seller. *Jennings v. Bouldin*, 98 Ark. 105, 134 S.W. 948 (1911).

A suit affecting the title or any lien on the real estate is not lis pendens until a notice of the pendency of the action is filed in accordance with this section. *Henry Wrape Co. v. Cox*, 122 Ark. 445, 183 S.W. 955 (1916); *Jones v. Ainell*, 123 Ark. 532, 186 S.W. 65 (1916); *Cramer v. Rummel*, 132 Ark. 158, 200 S.W. 811 (1918).

Purchaser without actual knowledge of mortgage foreclosure suit instituted three days prior to purchase and without constructive notice because lis pendens notice had not been given, being a third party to the mortgage which was barred because no notation of any payment on the note was endorsed on the margin of its record, took title free from the mortgage lien even though he acquired title by quit-claim deed. *Shouse v. Scovill*, 200 Ark. 441, 139 S.W.2d 240 (1940).

A lis pendens notice became nugatory when the Supreme Court affirmed a judgment sustaining a demurrer to the plaintiff's complaint. *Tolley v. Wilson*, 212 Ark. 163, 205 S.W.2d 177 (1947).

The filing of the complaint is a condition precedent to filing the notice of lis pendens under this section and a prematurely filed notice of lis pendens is a nullity. *Keith v. Bratton*, 738 F.2d 314 (8th Cir. 1984).

Purchase by Spouse.

Where land owned by a husband was sold for taxes and purchased by his wife from the assignee of the tax title, she was not affected by the pendency of a suit to

recover the land from the husband since her title was in opposition to his. *Boykin v. Jones*, 67 Ark. 571, 57 S.W. 17 (1900) (decision under prior law).

Specific Performance.

A suit for the specific performance of a contract for the sale of real estate is within the rule as to lis pendens and one who acquires an interest in the property pending the suit from a party thereto is bound by the result of the suit. *Lightle v. Schmidt*, 144 Ark. 304, 222 S.W. 46 (1920).

Tenants.

A tenant going into possession of land under a defendant in pending mortgage foreclosure proceedings, without actual notice of the proceedings and in the absence of constructive notice thereof, is entitled to hold the land under his rental contract. *Jordan v. Hargis*, 156 Ark. 408, 246 S.W. 476 (1923).

Transfer.

The recording of a lis pendens affects the possession and interests in debtor's property; accordingly, the recording of the notice of lis pendens is itself a "transfer" within the meaning of 11 U.S.C. § 547, which transfer occurred when the notice was recorded. *Dupwe v. Worthen Nat'l Bank (In re Rising Fast Rentals, Inc.)*, 162 Bankr. 203 (Bankr. E.D. Ark. 1993).

Cited: *Mitchell v. Federal Land Bank*, 206 Ark. 253, 174 S.W.2d 671 (1943); *Chevron Oil Co. v. Tlappek*, 265 F. Supp. 598 (W.D. Ark. 1967), modified on other grounds, 407 F.2d 1129 (8th Cir. 1969); *Myers v. Muuss*, 281 Ark. 188, 662 S.W.2d 805 (1984).

16-59-102. Contents of notice.

The notice of the pendency of the suit shall set forth the title of the cause and the general object thereof, together with a correct and full description of the property to be affected thereby, the names of the parties to the suit, and the style of the court where the suit is pending.

History. Acts 1903, No. 65, § 1, p. 118; Acts 1965 (2nd Ex. Sess.), No. 5, § 1; C. & M. Dig., § 6979; Pope's Dig., § 8959; A.S.A. 1947, § 27-501.

16-59-103. Duty of recorder of deeds.

It shall be the duty of the recorder of deeds to record the notice of the pending suit in either a state court or United States district court in a book kept for that purpose, upon the payment of the same fees as are provided by law for recording mortgages.

History. Acts 1903, No. 65, § 1, p. 118; Acts 1965 (2nd Ex. Sess.), No. 5, § 1; C. & M. Dig., § 6979; Pope's Dig., § 8959; A.S.A. 1947, § 27-501.

16-59-104. Index of notices.

The recorder of deeds shall immediately upon the filing of the notice of the pendency of the action enter in an index to be kept in his or her office such reference to these notices as will enable all persons interested to search his or her office to obtain a description of the property to be affected thereby and the names of the parties to the suit.

History. Acts 1903, No. 65, § 3, p. 118; C. & M. Dig., § 6981; Pope's Dig., § 8961; A.S.A. 1947, § 27-503.

16-59-105. Fees of recorder — Taxing as costs.

For the indexing and recording of the notice of the pendency of the suit, the recorder of deeds shall be entitled to the same fees as are provided by law for recording and indexing deeds. The sum thus paid to the recorder shall be taxed as part of the costs of executing the process by the sheriff or other officer.

History. Acts 1903, No. 65, § 6, p. 118; C. & M. Dig., § 6984; Pope's Dig., § 8964; A.S.A. 1947, § 27-504. **Cross References.** Fees of recorder, § 21-6-306.

16-59-106. Accounts due state lien from commencement of action.

The amount of any account audited, adjusted, and found due the state, with the penalties and interest thereon, shall be a lien on all the real estate of the person charged with the amount of any such account from the time the suit shall be brought for the recovery thereof.

History. Rev. Stat., ch. 18, § 35; C. & M. Dig., § 9302; Pope's Dig., § 11988; A.S.A. 1947, § 27-505.

16-59-107. Copy of notice as evidence.

A copy of the record, authenticated by the recorder of deeds, shall be evidence of the notice of the pendency of the suit and of the filing of the notice in all courts and places.

History. Acts 1903, No. 65, § 2, p. 118; C. & M. Dig., § 6980; Pope's Dig., § 8960; A.S.A. 1947, § 27-502.

RESEARCH REFERENCES

Ark. L. Rev. Documentary Evidence — Arkansas, 15 Ark. L. Rev. 79.

CHAPTER 60
VENUE

SUBCHAPTER

- 1. GENERAL PROVISIONS.
- 2. CHANGE OF VENUE.

Cross References. Uniform Interstate and International Procedure Act, § 16-4-101 et seq.

RESEARCH REFERENCES

Ark. L. Notes. Watkins, A Guide to Arkansas Venue, 1995 Ark. L. Notes 83.

CASE NOTES

ANALYSIS

In general.
Nature of claim.
Residence.

In General.

Since statehood, the General Assembly has provided that the basic rule of venue is that a defendant must be sued in the county where he lives or is summoned. *Quinney v. Pittman*, 320 Ark. 177, 895 S.W.2d 538 (1995).

Nature of Claim.

Venue is controlled by the characterization of claim by statute rather than the characterization of a claim given by a plaintiff. *Bristol-Meyers Squibb Co. v. Saline County Circuit Court*, 329 Ark. 357, 947 S.W.2d 12 (1997).

When two or more actions are pled that lie in different venues, venue is determined by the real character of the action and the principal right being asserted. *Bristol-Meyers Squibb Co. v. Saline County Circuit Court*, 329 Ark. 357, 947 S.W.2d 12 (1997).

Residence.

The General Assembly was aware of the difference between the words “resides” and “domicile,” was aware of the fact that a person might have a residence in one county and his domicile in another, and deliberately chose to use the word “resides” in this chapter; “residency” means the place of actual abode, not a home which one expects to occupy at some future time. *Quinney v. Pittman*, 320 Ark. 177, 895 S.W.2d 538 (1995).

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 16-60-101. Actions brought where subject of action situated.
- 16-60-102. Actions brought where cause of action arose.
- 16-60-103. Actions which must be brought in Pulaski County.
- 16-60-104. Actions against corporations.
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SECTION.

- maintaining more than one office.
- 16-60-106. Actions against railroad or stage line.
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SECTION.

- 16-60-109. Contract actions against non-resident.
- 16-60-110. Actions against person in penitentiary or asylum.
- 16-60-111. Actions on debt, account, or note.
- 16-60-112. Actions for personal injury or death.
- 16-60-113. Actions for damage to, or conversion of, personal property — Actions for fraud.
- 16-60-114. Contract actions by resident subcontractor, supplier, or materialman against non-resident prime contractor

SECTION.

- or subcontractor — Affidavit of contractor.
- 16-60-115. Action by insured or beneficiary against surety on contractor's performance bond.
- 16-60-116. Other actions — County where defendant resides or is summoned — Effective service.
- 16-60-117. Actions local in nature — Service anywhere in state.
- 16-60-118. Civil actions in Pulaski County.

Preambles. Acts 1935, No. 74, contained a preamble which read: "Whereas, large and numerous business enterprises of various kinds are being operated in the state of Arkansas by individuals, firms, copartnerships and association of persons and under the law as it now exists the venue for suits against them is fixed in the county of their residence or where such person or a member of the firm, copartnership or association may be found, and in many instances this works to the disadvantage of those who deal with such person, firm, copartnership or association by requiring the person so desiring to sue to go to the place of residence of such person, firm, copartnership or association and it is the purpose of this act to relieve against this situation ..."

Effective Dates. Acts 1871, No. 48, § 1 [890]: effective 90 days after passage.

Acts 1935, No. 74, § 3: approved Feb. 26, 1935. Emergency clause provided: "It is hereby ascertained and declared that a large number of people in the State of Arkansas are affected by this act and that in many cases justice requires its immediate effectiveness and it is therefore declared that an emergency exists and this act shall be in full force and effect from and after passage."

Acts 1939, No. 314, § 3: approved Mar. 15, 1939. Emergency clause provided: "It is found that the revenues of many counties are reduced by paying expenses of courts for the trial of actions brought from other counties to the damage of the tax-

payers, and the dockets of the circuit courts in many counties congested and the time of such courts taken up by actions from other counties so that there is not sufficient time for the courts properly to try local cases, and an emergency is thereby created and is declared and this act shall be in force immediately from and after its passage."

Acts 1941, No. 21, § 2: approved Feb. 3, 1941. Emergency clause provided: "It is hereby ascertained and declared to be a fact that the laws concerning service of process in Arkansas are in an uncertain state; furthermore, that there are complaints now pending in the courts of Arkansas, brought on meritorious causes of action, upon which it may be impossible to secure service of process, the actions being local in nature and service being now in some cases limited to the county in which such actions are brought. Therefore, this act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared to exist and this act shall be in full force and effect from and after the date of its passage."

Acts 1941, No. 317, § 3: approved Mar. 26, 1941. Emergency clause provided: "It is hereby found and declared that in many instances it is necessary for an injured party to bring more than one action in different counties in order to obtain relief and damages arising out of the same wrongful or negligent act; that such multiplicity of suits constitute an expense to

many counties within the state and a crowding of their dockets, and an emergency is hereby declared to exist, and this act being necessary for the preservation of the public peace, health and safety, it shall be in force and effect from and after its passage."

Acts 1947, No. 182, § 3: Mar. 6, 1947. Emergency clause provided: "It is found and declared that in many instances litigants to actions for personal injury and property damage have a cause of action growing out of the same accident and that the jurisdiction for property damage is in one county and for personal injury in another county, and that as a result thereof an inconvenience and expense arises to the litigants and multiplicity of suits results therefrom, and because of these conditions and this act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared to exist, and this act shall be in full force and effect from and after its passage and approval."

Acts 1947, No. 347, § 6: Mar. 28, 1947. Emergency clause provided: "Whereas many nonresident persons, firms, partnerships and corporations are not now qualified under the Constitution and laws of this State to do business herein and by reason of operating business in and through the State of Arkansas injury and damage are being done to persons and property within said State; and whereas in cases of such injury and damage by such nonresident defendants those suffering damages thereby have no convenient method by which they may sue to enforce their rights, if any, in the State of Arkansas, and this act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared to exist and this act shall

be in full force and effect from and after its passage and approval."

Acts 1985, No. 921, § 3: Apr. 15, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is urgent need for enactment of legislation to enable citizens of the State of Arkansas to bring legal action in local courts in counties where citizens have been subjected to fraudulent conduct by telephone, mail or other means; that this Act is designed to permit citizens to bring actions for fraud in the county where the fraud occurred, has been initiated, has been consummated or has been communicated whether such fraud is common law fraud or other fraudulent conduct so designated as insurance, securities, consumer or other fraud under the laws of the State of Arkansas; and that this Act should be given effect as soon as possible. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1989 (3rd Ex. Sess.), No. 56, § 4: Nov. 16, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that a serious question exists regarding the venue requirements for actions brought against confined persons, particularly when that person is being confined in a facility not located within the county in which he resided or claimed his residence, and that this law is required to clear up that confusion. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Contractual provision limiting place or court in which action may be brought. 31 ALR 4th 404.

Am. Jur. 77 Am. Jur. 2d, Venue, § 1 et seq.

Ark. L. Rev. Conflict of Laws — Action

for Injury to Extrastate Land, 6 Ark. L. Rev. 221.

Grounds for Venue in Arkansas — A Survey, 25 Ark. L. Rev. 468.

C.J.S. 67A C.J.S., Parties, § 1 et seq. 92A C.J.S., Venue, § 1 et seq.

16-60-101. Actions brought where subject of action situated.

Actions for the following causes must be brought in the county in which the subject of the action, or some part thereof, is situated, except as provided in § 16-60-116(d):

- (1) The recovery of real property, or of an estate or interest therein;
- (2) The partition of real property;
- (3) The sale of real property under a mortgage, lien, or other encumbrance or charge; and
- (4) An injury to real property.

History. Civil Code, § 84; C. & M. Dig., § 1164; Pope's Dig., § 1386; A.S.A. 1947, § 27-601.

Cross References. Actions in which

attachments may be sued out may be prosecuted in any county in which property may be attached, § 16-110-105.

CASE NOTES

ANALYSIS

Applicability.

Character of complaint.

—Local actions.

Conflict of laws.

Encumbrances.

—Foreclosure.

—Quiet title.

Injunction.

Injury to crops and land.

Injury to land.

Interest in lands.

Jurisdiction.

—Consent to jurisdiction.

—Federal jurisdiction.

—Incidental jurisdiction.

—Multiple jurisdictions.

Leases.

Partition of land.

Recovery of lands.

Specific performance.

Trusts.

Applicability.

This section applies to all actions coming within its terms whether brought at law or in equity. *Wilson v. Parkinson*, 157 Ark. 69, 247 S.W. 774 (1923).

This section is not applicable to actions for discovery. *Morgan Utils., Inc. v. Perry County*, 183 Ark. 542, 37 S.W.2d 74 (1931).

Character of Complaint.

When a complaint asserts both local and transitory causes of action the venue is determined by the real character of the action, by its principal purpose or object; thus, plaintiff's complaint essentially as-

serted a transitory cause of action, not a local one and, therefore, venue could not be fixed in the county of the plaintiff's property since defendants resided elsewhere. *Atkins Pickle Co. v. Burrough-Uerling-Brasuell Consulting Eng'rs, Inc.*, 275 Ark. 135, 628 S.W.2d 9 (1982).

Where the plaintiffs brought an action in both tort and contract against contractor and subcontractors, the action was properly brought in a county in which at least one of the defendants was a resident because the allegation of damage and prayer for relief showed that the real action was on the contract. *Frank A. Rogers & Co. v. Whitmore*, 275 Ark. 324, 629 S.W.2d 293 (1982).

Venue in county where land was located was proper for both compulsory counterclaim and permissive third party complaint, since both claims involved the same cause of action as the original complaint and had common questions of law and fact. *Wasp Oil, Inc. v. Arkansas Oil & Gas, Inc.*, 280 Ark. 420, 658 S.W.2d 397 (1983).

—Local Actions.

If the purpose of a bill and the effect of a decree are to reach and operate upon the land itself, then it is regarded as a proceeding in rem and is a local action and must be brought in the county where the land is situated. *Dowdle v. Byrd*, 201 Ark. 775, 147 S.W.2d 343 (1941).

Where the object of the suit was to compel defendant to accept a conveyance of real estate and to pay therefor in accor-

dance with his contract so to do, and if he refused to do so, having acquired the outstanding title of the mortgagee, to have a lien therefor decreed upon the land and the land condemned to satisfy the lien, the action is local under this section as it is to recover an interest in real estate. *Dowdle v. Byrd*, 201 Ark. 775, 147 S.W.2d 343 (1941).

In determining whether action brought is local, regardless of title of suit, the court will look to the effect of the decree, and if effect of decree is to affect an interest in land, the court will hold that the action must be filed in the county where the land is located. *Drum v. McDaniel*, 215 Ark. 690, 222 S.W.2d 59 (1949).

Where purpose of action, and effect of decree is to reach and operate upon the land itself, then action is a proceeding in rem and it must be brought in county where the land is situated. *Drum v. McDaniel*, 215 Ark. 690, 222 S.W.2d 59 (1949).

Conflict of Laws.

Arkansas was domicile of borrower, situs of security given and place where preliminary negotiations for loan were conducted, therefore parties could properly fix law of Arkansas as law governing their contract. *Jones v. Tindall*, 216 Ark. 431, 226 S.W.2d 44 (1950).

Encumbrances.

—Foreclosure.

A suit to foreclose a mortgage on a town lot was properly brought in the county in which the lot was situated. *Harrison v. Bank of Fordyce*, 178 Ark. 760, 12 S.W.2d 400 (1929).

Chancery court of county where mortgaged lands are partly situated is the proper tribunal in which to institute foreclosure suit. *Wasson v. Dodge*, 192 Ark. 728, 94 S.W.2d 720 (1936).

—Quiet Title.

An action to remove a cloud upon the title to land is a local action and should be brought in the county in which the land is situated. *Fidelity Mtg. Co. v. Evans*, 168 Ark. 459, 270 S.W. 624 (1925).

An action to have certain deeds voided and entries removed as clouds upon title was a quiet title action the venue of which was governed by this section even though a state commission was a party defendant.

State ex rel. Ark. Publicity & Parks Comm'n v. Butt, 229 Ark. 433, 316 S.W.2d 204 (1958).

In suit to quiet title where county chancery court entered decree as to title of the disputed property and nothing in the record showed conclusively that some part of the land was not located in that county, Supreme Court would indulge the presumption that the trial court had jurisdiction. *Black v. Clary*, 235 Ark. 1001, 363 S.W.2d 528 (1963).

Injunction.

Jurisdiction to enjoin sale of land is transitory. *Jones, McDowell & Co. v. Fletcher*, 42 Ark. 422 (1883).

An action to enjoin commissioners of a road district from extending assessments against lands in another district is not a local action but is transitory. *Arkansas-Louisiana Hwy. Imp. Dist. v. Douglas-Gould & Star City Rd. Imp. Dist.*, 138 Ark. 162, 210 S.W. 150 (1919).

A suit to restrain a threatened injury to real property is a local action. *Drainage Dist. No. 7 v. Hutchins*, 184 Ark. 521, 42 S.W.2d 996 (1931).

Chancery court had jurisdiction to enjoin city located within county to refrain from dumping sewage in creek to detriment of downstream landowners but would not have had jurisdiction to award damages for such action as to landowners located in another county so that consent decree enjoining the action would not preclude subsequent suit by out-of-county landowners in county where land lay alleging that pollution of stream amounted to a taking of owners' land by city and seeking damages for the same. *Weathers v. City of Springdale*, 239 Ark. 535, 390 S.W.2d 125 (1965).

Injury to Crops and Land.

A suit to restrain defendant from removing earth from plaintiff's land is an action for an injury to real property. *Cox v. Little Rock & M.R.R.*, 55 Ark. 454, 18 S.W. 630 (1892).

An action for conversion of timber is not an action for injury to real property. *Emerson v. Turner*, 95 Ark. 597, 130 S.W. 538 (1910).

An action, the effect of which is to prevent defendants from interfering with plaintiff's mining business, is not an action for, nor to prevent, an injury to real

property. *Jones v. State*, 170 Ark. 863, 281 S.W. 663 (1926).

An action by tenants for injury to land must be brought in the county where the land lies. *Missouri P.R.R. v. Henry*, 188 Ark. 530, 66 S.W.2d 636 (1934).

A contractor who injures another's land while engaged in constructing a state highway may be sued in the county where the injury was committed. *Arkansas Hwy. Comm'n v. Holt*, 190 Ark. 868, 81 S.W.2d 929 (1935).

Action of trespass must be filed in county where land is located, as it is a local action. *Pruitt v. Sebastian County Coal & Mining Co.*, 215 Ark. 673, 222 S.W.2d 50 (1949).

In suit by plaintiffs to recover damage to crop filed in county where plaintiffs' land was located, service on defendant in another county was proper, since damage to crop was local in nature. *Heeb v. Prysock*, 219 Ark. 899, 245 S.W.2d 577 (1952).

Complaint to recover damages for injury to property of plaintiff by defendant contractor engaged in widening highway under a contract with state was a suit in tort instead of contract and it was properly filed in county where land was located. *Southeast Constr. Co. v. Wood*, 223 Ark. 325, 265 S.W.2d 720 (1954); *Southeast Constr. Co. v. Wood*, 223 Ark. 328, 265 S.W.2d 722 (1954).

An action for injury to realty is local in nature and must be brought in the county in which the land is situated and a building being moved is still realty where there is no intention to convert it into personal property, so that claim for damage to it in moving is properly venued in the county where the building was when moved. *Bucton Constr. Co. v. Carlson*, 225 Ark. 208, 280 S.W.2d 408 (1955).

In actions concerning real estate, venue lies in the county where the realty is located, so where a plaintiff alleges that buildings were damaged by a defendant corporation in moving of them and there was no intention to convert the buildings to personalty the venue of the action is governed by the situs of the buildings when moved and lies in the county where they were located. *Bucton Constr. Co. v. Carlson*, 225 Ark. 208, 280 S.W.2d 408 (1955).

An action to enjoin a trespass on real property must be considered local in char-

acter. *Miracle v. Jacoby*, 192 F. Supp. 907 (W.D. Ark. 1961).

Injury to Land.

Where plaintiff storage facility owner did not allege damages sustained to its real property, granting venue under this section in the county where facility was located was not proper, since a prefabricated storage facility is not affixed to the site and could be removed without damage to the freehold, thus it was not injured real property as required for venue. *Atkins Pickle Co. v. Burrough-Uerling-Brasuell Consulting Eng'rs, Inc.*, 271 Ark. 897, 611 S.W.2d 775 (Ct. App. 1981).

Interest in Lands.

A suit to recover title to mortgages sold to the defendant was for the recovery of an interest in land and the venue was properly laid in the county wherein the mortgaged lands were situated. *National Equity Life Ins. Co. v. Seamster*, 188 Ark. 170, 65 S.W.2d 31 (1933).

Jurisdiction.

Circuit court of county in which real estate levied upon was located had jurisdiction of action to determine validity of distress warrant. *Crawford v. Carson*, 35 Ark. 565 (1880).

The circuit court of county is without jurisdiction to try an action in ejectment to lands in another county in the absence of an order of a change of venue. *King v. Harris*, 134 Ark. 337, 203 S.W. 847 (1918).

In action to replevy check deposited in escrow pursuant to contract to purchase interest in realty located out-of-state, where vendor intervened seeking specific performance, insofar as relief prayed for would not affect title to the land, but could be obtained through personal obedience of the parties, court had jurisdiction. *Bell v. Wadley*, 206 Ark. 569, 177 S.W.2d 403 (1944).

Court did not have jurisdiction of removal action by state resident against foreign corporation which was based on real estate where complaint sought damages for injury to real estate and sought damages for breach of contract, since tort and contract could not be joined in same action; as to contract action, defendant could only be served in county where it maintained branch under § 16-58-125(a). *Mayner v. Utah Constr. Co.*, 108 F. Supp. 532 (W.D. Ark. 1952).

—Consent to Jurisdiction.

Consent cannot give jurisdiction of a suit in another county. *Jacks v. Moore*, 33 Ark. 31 (1878).

Parties to an action of trespass cannot by consent confer jurisdiction of the subject matter, if land is not located in the county where suit is filed. *Pruitt v. Sebastian County Coal & Mining Co.*, 215 Ark. 673, 222 S.W.2d 50 (1949).

—Federal Jurisdiction.

Since 28 USC § 1391(a) does not apply to local actions which are actions in rem or quasi in rem, the actions must be brought within the jurisdiction where the res, or at least some part of it, is located physically. *Cobb v. National Lead Co.*, 215 F. Supp. 48 (E.D. Ark. 1963).

Where a diversity case is removed to a federal court from a state court, the federal court has only such jurisdiction as was possessed by the state court from which the action was removed. *Cobb v. National Lead Co.*, 215 F. Supp. 48 (E.D. Ark. 1963).

With respect to transitory actions commenced originally in federal court solely on the basis of diversity of citizenship, venue is determined by the provisions of 28 USC § 1391(a), and state venue statutes are not applicable. *Cobb v. National Lead Co.*, 215 F. Supp. 48 (E.D. Ark. 1963).

—Incidental Jurisdiction.

A judgment for defendant in an action in one county for damages to personal property alleged to have been caused by the negligence and destruction of building in another county barred a subsequent action in the latter county between the same parties for damages for the destruction of the building. *Dunaway v. Russell*, 173 Ark. 898, 294 S.W. 1 (1927).

County court in which foreclosure suit was properly instituted has jurisdiction to try every question, both legal and equitable, that may arise in the case, including construction of will of testator domiciled in another county to determine whether mortgagor had title to land sought to be foreclosed. *Wasson v. Dodge*, 192 Ark. 728, 94 S.W.2d 720 (1936).

Where county court rightfully acquired jurisdiction over necessary parties and subject matter in foreclosure proceeding, no other court of equal dignity or one having concurrent jurisdiction had any

right to interfere. *Wasson v. Dodge*, 192 Ark. 728, 94 S.W.2d 720 (1936).

Where decree foreclosing mortgage lien was rendered in the one district of a county, service had on defendant in another district of that county was held to support deficiency judgment, since court having jurisdiction to foreclose the mortgage had the incidental jurisdiction to render a personal judgment for the debt it secured. *Husband v. Crockett*, 195 Ark. 1031, 115 S.W.2d 882 (1938).

When lands located in two counties were both subject to a single note and mortgage and when the mortgage holder had previously obtained a decree of foreclosure in one county for the land within that county, the holder could not then institute a separate action in the second county for the remaining land since the court in the first action, having assumed jurisdiction for one purpose, retained it for all purposes with the power to grant all of the legal and equitable relief to which the parties were entitled. *Steelman v. Planters Prod. Credit Ass'n*, 285 Ark. 217, 685 S.W.2d 800 (1985).

—Multiple Jurisdictions.

When the county of the venue is divided into two judicial districts, it may be brought in either. *Jones v. State*, 170 Ark. 863, 281 S.W. 663 (1926).

Where all the parties to an action to quiet title are interested in all the lands by reason of claiming under a common title, the court of the county in which the greater portion of the land is situated had jurisdiction though a small portion of it was situated in another county. *Bowen v. Frank*, 179 Ark. 1004, 18 S.W.2d 1037 (1929).

In an action to determine the ownership of land formed by accretion where all of the land actually in controversy lay in one county but in their complaint plaintiffs asked for the determination of adjoining land in another county and, though defendants conceded this land to be plaintiffs' the section applies, hence the action could be brought in either county. *Adkisson v. Starr*, 222 Ark. 331, 260 S.W.2d 956 (1953).

Although the land over which the land owners established a prescriptive easement was in Perry County, venue was proper in Conway County because a transitory claim, the request for an injunction

prohibiting the servient property owners from interfering with the land owners use of the gate in Conway County, was included in the complaint; thus, the trial court's refusal to dismiss on the basis of venue was correct. *River Bar Farms, L.L.C. v. Moore*, 83 Ark. App. 130, 118 S.W.3d 145 (2003).

Leases.

Since an oil and gas lease conveys an interest and an easement in the land, action to enforce a lien upon lease must be brought in county where land is. *Clark v. Dennis*, 172 Ark. 1096, 291 S.W. 807 (1927).

Suit to cancel a five-year lease of land on ground that lessor had forfeited or abandoned his rights therein is a transitory action, the lease being personal property, and should have been brought in the county where lessees resided or in some county where personal service could be obtained upon them. *Jones v. Brinkman*, 200 Ark. 583, 139 S.W.2d 686 (1940).

An action for the recovery of damages to real property based on the breach of a written lease agreement is transitory. *Ferrill v. Collins*, 222 Ark. 840, 262 S.W.2d 885 (1953).

Action seeking a declaratory judgment interpreting acreage under a lease agreement between landlord and tenant did not involve recovery of an interest in real property and should have been brought in the county of defendant's residence. *Doyle v. Williams*, 251 Ark. 797, 475 S.W.2d 170 (1972).

Where a lessee brought an action to quiet title against the landowners and a subsequent lessee, the complaint was local in nature and the plaintiff properly filed the action in the county where the land was located. *Wasp Oil, Inc. v. Arkansas Oil & Gas, Inc.*, 280 Ark. 420, 658 S.W.2d 397 (1983).

Partition of Land.

Where the estate of a deceased person has been wound up, an action for partition of the land among the heirs should be brought in the county where the land or some part of it is situated and not in the county where the deceased's representatives qualified. *Cowling v. Nelson*, 76 Ark. 146, 88 S.W. 913 (1905).

Recovery of Lands.

A suit to cancel a fraudulent deed of

land and revest title in plaintiff is an action for the recovery of real property. *McLaughlin v. McCrory*, 55 Ark. 442, 18 S.W. 762 (1892).

An action to recover certain lands, conveyed away, and to declare and enforce judgment liens against the same, is local and not transitory and must be brought in the county where the lands are situated. *Harris v. Smith*, 133 Ark. 250, 202 S.W. 244 (1918).

A suit in effect to compel the reconveyance of land sold under execution is a local action maintainable only where land is situated. *Arkansas Mineral Prods. Co. v. Creel*, 181 Ark. 722, 27 S.W.2d 1003 (1930).

Specific Performance.

The general rule is that where in a suit for specific performance of a contract involving land plaintiff seeks only in personam relief against defendant and does not seek a decree which by virtue of in rem statutes will act on the title to the land itself, the action is considered to be in personam and transitory, and statutes like this section are inapplicable; thus, under this general rule such an action may be maintained in any jurisdiction where service on defendant can be obtained. *Cobb v. National Lead Co.*, 215 F. Supp. 48 (E.D. Ark. 1963).

Courts of one state can render an in personam decree compelling specific performance of a contract relating to lands located in another state, and this rule would seem to apply a fortiori to suits for specific performance brought in one subdivision of a state with respect to property located in another subdivision where in personam relief only is sought. *Cobb v. National Lead Co.*, 215 F. Supp. 48 (E.D. Ark. 1963).

Trusts.

In an action to increase payments to the beneficiary of a testamentary trust, venue is not in the county where the testator's will was probated, but in the county where the trustee resides or is summoned. *Thompson v. Dunlap*, 244 Ark. 178, 424 S.W.2d 360 (1968).

Cited: *Peel v. Kelley*, 268 Ark. 90, 594 S.W.2d 11 (1980); *Cash v. Citizens Bank*, 277 Ark. 449, 642 S.W.2d 318 (1982); *Two Bros. Farm v. Riceland Foods, Inc.*, 57 Ark. App. 25, 940 S.W.2d 889 (1997).

16-60-102. Actions brought where cause of action arose.

Actions for the following causes must be brought in the county where the cause, or some part thereof, arose:

(1) An action for the recovery of a fine, penalty, or forfeiture imposed by a statute, except that where the offense for which the claim is made was committed on a watercourse or road which is the boundary of two (2) counties, the action may be brought in either of them;

(2) An action against a public officer for an act done by him or her in virtue or under color of his or her office, or for a neglect of official duty; and

(3) An action upon the official bond of a public officer, except as provided in §§ 16-106-101 and 16-106-104.

History. Civil Code, § 85; C. & M. Dig., § 1165; Pope's Dig., § 1387; A.S.A. 1947, § 27-602.

CASE NOTES

ANALYSIS

Applicability.

Action against public officer.

Action on official bond.

Official act.

Applicability.

This section refers to an action for the benefit of the public and not to private actions against a wrongdoer. *Chicago, R.I. & Pac. Ry. v. Miller*, 103 Ark. 151, 146 S.W. 485 (1912).

Section 16-106-101(d) fixes the venue in actions against state officers, and is not changed by this section which fixes the venue in actions against other public officers except state officers, on the ground of "expressio unius est exclusio alterius," as § 16-106-101(d) refers to actions against state officers, and this section refers to actions against public officers. *Downey v. Toler*, 214 Ark. 334, 216 S.W.2d 60 (1948).

Subdivision (1) applies only to penal actions instituted by the state for benefit of public and not to private actions against a wrongdoer violating § 4-75-201 et seq. *Concrete, Inc. v. Arkhola Sand & Gravel Co.*, 228 Ark. 1016, 311 S.W.2d 770 (1958).

Action against Public Officer.

A suit against a sheriff, his deputies and bondsmen for killing plaintiff's husband, must be brought in the county where the

cause of action arose. *Edwards v. Jackson*, 176 Ark. 107, 2 S.W.2d 44 (1928).

Alleged cause of action against county clerk for unlawfully issuing a marriage license in that county was improperly brought in another county. *Ragan v. Cox*, 208 Ark. 809, 187 S.W.2d 874 (1945).

An action against a town marshal, who was also a deputy sheriff, for damages for an alleged unjustifiable assault in the course of making an arrest is within the province of this section. *Moncus v. Raines*, 210 Ark. 30, 194 S.W.2d 1 (1946).

A court reporter is not a public officer and this section does not govern the jurisdiction of cause brought against him for an act done under color of office, or for neglect of official duty. *Wirges v. Arrington*, 239 Ark. 1047, 396 S.W.2d 292 (1965).

Action on Official Bond.

An action on a bond of a county treasurer could be maintained only in the county of which he was treasurer. *State v. American Sur. Co.*, 187 Ark. 673, 62 S.W.2d 13 (1933).

Official Act.

The official act complained of must be official conduct resulting in or causing the injury. *Williams v. Priddy*, 188 Ark. 137, 64 S.W.2d 553 (1933).

Cited: *Arkansas Game & Fish Comm'n v. Lindsey*, 292 Ark. 314, 730 S.W.2d 474 (1987); *Oxford v. Perry*, 340 Ark. 577, 13 S.W.3d 567 (2000).

16-60-103. Actions which must be brought in Pulaski County.

The following actions must be brought in the county in which the seat of government is situated:

(1) All civil actions in behalf of the state, or which may be brought in the name of the state, or in which the state has or claims an interest, except as provided in § 16-106-101;

(2) All actions brought by state boards, state commissioners, or state officers in their official capacity, or on behalf of the state, except as provided in § 16-106-101;

(3) All actions against the state and all actions against state boards, state commissioners, or state officers on account of their official acts, except that if an action could otherwise be brought in another county or counties under the venue laws of this state, as provided in § 16-60-101 et seq., then the action may be brought either in Pulaski County or the other county or counties; and

(4) All other actions required by law to be brought in Pulaski County.

History. Civil Code, § 90; Acts 1871, No. 48, § 1 [90], p. 219; A.S.A. 1947, § 27-603; Acts 2001, No. 806, § 1; 2003, No. 1185, § 190.

Publisher's Notes. Acts 2001, No. 806, became law without the Governor's signature.

Amendments. The 2001 amendment

inserted "except that if ... county or counties; and" in (3).

The 2003 amendment, in (4), inserted "other," substituted "required" for "now authorized" and deleted "the separate Court of Chancery of" preceding "Pulaski."

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Practice, Procedure, and Courts, 24 UALR L.J. 523.

Annual Survey of Caselaw, Civil Procedure, 24 UALR L.J. 893.

CASE NOTES

ANALYSIS

Actions against state, etc.

Actions against administrative agency.

Actions by state, etc.

Other legislation.

Actions Against State, Etc.

This section relates only to venue and not jurisdiction so that an action to enjoin state commission to issue license to petitioner was maintainable in another county where improper venue was waived. *Arkansas State Racing Comm'n v. Southland Racing Corp.*, 226 Ark. 995, 295 S.W.2d 617 (1956).

Action for mandatory injunction was a common law cause of action wherein venue by statute was in Pulaski County until waived by defendant's entering his

appearance by filing demurrer. *Arkansas State Racing Comm'n v. Southland Racing Corp.*, 226 Ark. 995, 295 S.W.2d 617 (1956).

Proper venue against state board held to be in Pulaski County. *Liquefied Petroleum Gas Bd. v. Newton*, 230 Ark. 267, 322 S.W.2d 67 (1959).

When a city or other local agency is involved in a Freedom of Information Act suit, the aggrieved person should bring suit in the local judicial district where the parties and witnesses are apt to reside and not, despite the wording of § 25-19-107, in Pulaski County where most state agencies have their principal offices. *ACORN v. Jackson*, 263 Ark. 67, 562 S.W.2d 589 (1978).

Where there is a complaint against a state agency under the Freedom of Infor-

mation Act, § 25-19-101 et seq., the aggrieved person can appeal either to the Pulaski Circuit Court, where most state agencies have their principal office, or to the corresponding court in the county of his own residence. *Acorn v. Jackson*, 263 Ark. 67, 562 S.W.2d 589 (1978).

Actions Against Administrative Agency.

Venue in suit against petitioner state administrative agency to have certain regulations it adopted declared unconstitutional was in the county in which the seat of government was situated, pursuant to subdivision (3), which for petitioner was in Pulaski County as its official residence was located there. *Arkansas Game & Fish Comm'n v. Harkey*, 345 Ark. 279, 45 S.W.3d 829 (2001).

Actions by State, Etc.

A foreign corporation authorized to do business in Arkansas is not recognized as having a local or county residence, and a suit brought in the name of the state against the corporation must be brought at the seat of government, which is in Pulaski County. *Southwestern Bell Tel. Co. v. Roberts*, 246 Ark. 864, 440 S.W.2d 208 (1969).

Other Legislation.

This section, construed with § 16-106-101(d), held to be superseded. *Cook v. Gore*, 214 Ark. 777, 218 S.W.2d 82 (1949).

The general venue statute, § 16-60-113, does not control actions brought on behalf of or in the name of the state. *Southwestern Bell Tel. Co. v. Roberts*, 246 Ark. 864, 440 S.W.2d 208 (1969).

This section does not restrict the venue of a habeas corpus action which by § 16-112-102(a) is made coextensive with the state. *State Dep't of Pub. Welfare v. Lipe*, 257 Ark. 1015, 521 S.W.2d 526 (1975).

Cited: *Phillips v. Arkansas Real Estate Comm'n*, 244 Ark. 577, 426 S.W.2d 412 (1968); *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 437 S.W.2d 459 (1969); *Kemp-Bradford VFW Post 4764 v. Wood*, 262 Ark. 168, 554 S.W.2d 344 (1977); *Sikes v. General Publishing Co.*, 264 Ark. 1, 568 S.W.2d 33 (1978); *Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983); *Hankins v. McElroy*, 313 Ark. 394, 855 S.W.2d 310 (1993); *Willis v. Circuit Court of Philips County*, 342 Ark. 128, 27 S.W.3d 372 (2000); *Valley v. Bogard*, 342 Ark. 336, 28 S.W.3d 269 (2000).

16-60-104. Actions against corporations.

An action, other than those in §§ 16-60-101 — 16-60-103, against a corporation created by the laws of this state may be brought in the county in which it is situated or has its principal office or place of business, or in which its chief officer resides. However, if the corporation is a bank or insurance company, the action may be brought in the county in which there is a branch of the bank or agency of the company, where it arises out of a transaction of the branch or agency.

History. Civil Code, § 92; C. & M. Dig., § 1171; Pope's Dig., § 1393; A.S.A. 1947, § 27-605.

CASE NOTES

ANALYSIS

In general.
Applicability.
Insurance company.
Joint defendants.
Other legislation.
Personal injury.
Proper county.

Real property.
Shareholder's derivative suit.

In General.

When a complaint asserts both local and transitory causes of action the venue is determined by the principal purpose of the action. *Farm Bureau Mut. Ins. Co. v. Southall*, 281 Ark. 141, 661 S.W.2d 383

(1983), aff'd on other grounds, 238 Ark. 335, 676 S.W.2d 228 (1984); *Arkansas Bank & Trust Co. v. Erwin*, 300 Ark. 599, 781 S.W.2d 21 (1989).

Applicability.

The venue of an action for abuse of prosecution, malicious prosecution, vexatious suit, and false imprisonment is governed by this section. *Arkansas Valley Indus., Inc. v. Roberts*, 244 Ark. 432, 425 S.W.2d 298 (1968).

Section held inapplicable. *Pulpwood Suppliers, Inc. v. First Nat'l Bank*, 21 Ark. App. 147, 729 S.W.2d 425 (1987).

Insurance Company.

Holder of accident insurance policy could not sue insurer for overpayment of premiums in county of insured, since plaintiff was not suing for a loss under policy or as beneficiary, hence suit was required to be filed in county where insurer had its principal place of business. *American Republic Life Ins. Co. v. Cummings*, 218 Ark. 888, 239 S.W.2d 10 (1951).

In cause of action by insured venue might be established either pursuant to this section or pursuant to § 16-60-116(a), the "catch-all" venue provision; insurance company was not entitled to writ prohibiting such action on ground of improper venue, since the original action, for all practical purposes, was no longer pending. *Farm Bureau Mut. Ins. Co. v. Southall*, 281 Ark. 141, 661 S.W.2d 383 (1983), aff'd on other grounds, 238 Ark. 335, 676 S.W.2d 228 (1984).

Joint Defendants.

In an action where the complaint states no cause of action against one of the defendants, the action is improperly brought in the county of that defendant's residence where, if the other defendant had been the sole one, the action should have been brought in the county where he had his principal place of business. *Beal-Doyle Dry Goods Co. v. Odd Fellows Bldg. Co.*, 109 Ark. 77, 158 S.W. 955 (1913).

Other Legislation.

Where a corporation resides in one county and an injury for which it is sued occurs in another county, §§ 16-58-118(a) and 16-60-112(a) take precedence over this section, the proper county for venue being where the injury occurred or where

the person injured resides. *Forrest City Mach. Works, Inc. v. Colvin*, 257 Ark. 889, 521 S.W.2d 206 (1975).

This section is not complemented by § 16-60-108 as to foreign corporations. *Cavette v. Ford Motor Credit Co.*, 260 Ark. 874, 545 S.W.2d 612 (1977).

Personal Injury.

If the personal injury venue statute (§ 16-60-112(a)) is inconsistent with this section, it is only inconsistent insofar as actions for personal injury or death caused by a wrongful act are concerned and in that case the personal injury statute applies. *Arkansas Bank & Trust Co. v. Erwin*, 300 Ark. 599, 781 S.W.2d 21 (1989).

Proper County.

It is possible for a corporation to be situated in one county, have its principal office or place of business in another county, while the chief officer resides in still another county, and an action against the corporation may be brought in either of the three counties. *Spratley v. Louisiana & A. Ry.*, 77 Ark. 412, 95 S.W. 776 (1906).

A domestic corporation must be sued in the county in which it is situated or has its principal office or business, or in which its chief officer resides, or in a county where it has a branch office or other place of business, by service of process upon the agent or employee in charge thereof; and when not so brought, a motion to quash should be sustained. *Duncan Lumber Co. v. Blalock*, 171 Ark. 397, 284 S.W. 15 (1926), overruled on other grounds, *Anheuser-Busch, Inc. v. Manion*, 193 Ark. 405, 100 S.W.2d 672 (1937).

An action against a domestic corporation, under the Unfair Practices Act, § 4-75-201 et seq., which was filed in county wherein corporation was not situated, had no place of business and in which none of its officers resided, was subject to demurrer to the venue. *Concrete, Inc. v. Arkhola Sand & Gravel Co.*, 228 Ark. 1016, 311 S.W.2d 770 (1958).

Venue in action against a domestic corporation for damages to cargo which did not pass through Arkansas at all was fixed by this section and thus such action should have been brought in the county of its principal place of business even though carrier had irregular lines passing

through another county. *Willis Shaw Frozen Express v. Digby*, 260 Ark. 284, 538 S.W.2d 706 (1976).

It is not mandatory under this section, when read with § 16-58-125(a), that a corporation be sued only in the county where it has its principal place of business, but it may also be sued wherever it has a branch office or other place of business; accordingly, an action for tortious interference with a contract could properly be brought in a county in which the defendant corporation had only a branch office. *American Sav. & Loan Ass'n v. Enfield*, 261 Ark. 796, 551 S.W.2d 552 (1977).

Real Property.

In actions concerning real estate, venue lies in the county where the realty is located. Venue of action was governed by the situs of the buildings, when they were moved, and lay in the county where they were located. *Bucton Constr. Co. v. Carlson*, 225 Ark. 208, 280 S.W.2d 408 (1955).

Shareholder's Derivative Suit.

Venue in a shareholder's derivative suit is governed by this section; therefore, a shareholder's derivative suit brought by the president of the corporation was properly brought in the county of his residence. *Benton Window & Door, Little Rock Div., Inc. v. Garrett*, 290 Ark. 244, 718 S.W.2d 438 (1986).

Cited: *Oakleaf Mill Co. v. Lash*, 98 Ark. 394, 135 S.W. 872 (1911); *Road Imp. Dist. No. 4 v. Ball*, 170 Ark. 522, 281 S.W. 5 (1926); *Chevrolet Motor Co. v. Landers Chevrolet Co.*, 183 Ark. 669, 37 S.W.2d 873 (1931); *Philco-Ford Corp. v. Holland*, 261 Ark. 404, 548 S.W.2d 828 (1977); *Fraser Bros. v. Darragh Co.*, 316 Ark. 297, 871 S.W.2d 367 (1994); *Brown v. Texarkana Nat'l Bank*, 889 F. Supp. 351 (E.D. Ark. 1992); *Ison Props., LLC v. Wood*, 85 Ark. App. 443, 156 S.W.3d 742 (2004).

16-60-105. Actions against persons, partnerships, or associations maintaining more than one office.

An action, other than those mentioned in §§ 16-60-101, 16-60-102, 16-60-106 — 16-60-108, 16-60-110, against a person, firm, copartnership, or association engaged in business in this state which has or maintains more than one (1) office or place of business in this state, may be brought in any county in which the person, firm, copartnership, or association has or maintains any office, branch office, suboffice, or place of business, and service of process upon an agent of any person, firm, copartnership, or association at any such office, branch office, suboffice, or place of business shall be service upon such person, firm, copartnership, or association.

History. Acts 1935, No. 74, § 1; Pope's Dig., § 1385; A.S.A. 1947, § 27-609.

CASE NOTES

ANALYSIS

Purpose.

Agricultural cooperative association.

Corporations.

One place of business.

Purpose.

The legislature intended this section to create venue in an action against a corporation, foreign or domestic, in a county where the corporation elects to establish a

place of business or branch office. *Zolper v. AT & T Info. Sys.*, 289 Ark. 27, 709 S.W.2d 74 (1986).

Agricultural Cooperative Association.

Corporation laws apply to agricultural cooperative associations, and thus venue is proper in either the county in which the association's principal place of business is located or in the county in which one of its branch offices is located. *Two Bros. Farm*

v. Riceland Foods, Inc., 57 Ark. App. 25, 940 S.W.2d 889 (1997).

Corporations.

The venue statutes are applicable to corporations based on § 16-55-102, which defines person to include a corporation. *Zolper v. AT & T Info. Sys.*, 289 Ark. 27, 709 S.W.2d 74 (1986).

One Place of Business.

Service upon a partnership which maintains only one place of business in the

state by serving a summons upon the agent of the partnership in charge of said business is insufficient under this section. *Agee v. Snodgrass*, 196 Ark. 266, 117 S.W.2d 26 (1938).

Cited: *Agee v. Wildman*, 240 Ark. 111, 398 S.W.2d 542 (1966); *Ritholz v. Dodge*, 210 Ark. 404, 196 S.W.2d 479 (1946); *Bowsher v. Digby*, 243 Ark. 799, 422 S.W.2d 671 (1968); *Brown v. Texarkana Nat'l Bank*, 889 F. Supp. 351 (E.D. Ark. 1992).

16-60-106. Actions against railroad or stage line.

An action against a railroad company or an owner of a line of mail-stages or other coaches, upon a liability as a carrier, may be brought in any county through or into which the road or line of stages or coaches of the defendant upon which the cause of action arose passes.

History. Civil Code, § 93; C. & M. Dig., § 1172; Pope's Dig., § 1394; A.S.A. 1947, § 27-606.

CASE NOTES

ANALYSIS

In general.
Applicability.
Railroad injuries.
Recovery of penalty.
Service of process.

In General.

This section is mandatory and actions brought under it must be brought in one of the counties through or into which the railroad company or line of mail stages or coaches runs. *Viking Freight Co. v. Keck*, 202 Ark. 656, 153 S.W.2d 163 (1941).

Applicability.

This section has no application to a suit by an employee to recover his wages. *Spratley v. Louisiana & A. Ry.*, 77 Ark. 412, 95 S.W. 776 (1906).

Under this section all tortfeasors to whom its provisions apply, whether foreign or domestic corporations or individual owners, may be required to answer in any of the counties in which the venue is fixed. *Viking Freight Co. v. Keck*, 202 Ark. 656, 153 S.W.2d 163 (1941).

Railroad Injuries.

Plaintiff could bring suit for personal injuries occasioned by a collision of an

automobile in which she was riding with defendant's train in Pulaski County in the county of her residence, though defendant did not own or operate a line of railroad through or into that county. *Chicago, R.I. & Pac. Ry. v. Bone*, 203 Ark. 1067, 160 S.W.2d 51 (1942).

Recovery of Penalty.

An action against a common carrier to recover penalty for overcharge of fare may be brought in any county through or into which the defendant road passes. *Chicago, R.I. & Pac. Ry. v. Miller*, 103 Ark. 151, 146 S.W. 485 (1912).

Service of Process.

The objection that service of summons is insufficient may be waived by pleading to the merits without preserving the right to object. *St. Louis-San Francisco Ry. v. Solomon & Weinberg*, 161 Ark. 552, 256 S.W. 862 (1923).

This section is a venue statute and does not relate to the character of service necessary when suit is brought in any county through which the railroad or line of stages passes. *Lindley v. Kincannon*, 200 Ark. 772, 140 S.W.2d 1005 (1940).

Cited: *Viking Freight Co. v. Keck*, 202 Ark. 656, 153 S.W.2d 163 (1941).

16-60-107. Actions against turnpike company.

An action, other than one of those mentioned in §§ 16-60-101 — 16-60-103, against a turnpike road company may be brought in any county in which any part of the road of the defendant lies.

History. Civil Code, § 94; C. & M. Dig., § 1173; Pope's Dig., § 1395; A.S.A. 1947, § 27-607.

16-60-108. Actions against nonresident individual or foreign corporation.

An action, other than one of those mentioned in §§ 16-60-101 — 16-60-103, against a nonresident of this state, or a foreign corporation, may be brought in any county in which there may be property of or debts owing to the defendant.

History. Civil Code, § 95; C. & M. Dig., § 1174; Pope's Dig., § 1396; A.S.A. 1947, § 27-608.

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law, Civil Procedure, 1 UALR L.J. 131.

CASE NOTES**ANALYSIS**

In general.
Applicability.
Foreign surety.
Venue established.

In General.

This section not applicable to action for specific performance of contract in which only in personam relief was sought. *Cobb v. National Lead Co.*, 215 F. Supp. 48 (E.D. Ark. 1963).

Applicability.

With respect to transitory actions commenced originally in federal court solely on the basis of diversity of citizenship, venue is determined by the provisions of 28 USC § 1391(a), and state venue statutes are not applicable. *Cobb v. National Lead Co.*, 215 F. Supp. 48 (E.D. Ark. 1963).

This section, which provides that an action against a foreign corporation may be brought in any county in which there may be property or debts owing to the corporation, does not apply to fix venue where the foreign corporation has a place

of business or office in the state where service of summons may be had. *Cavette v. Ford Motor Credit Co.*, 260 Ark. 874, 545 S.W.2d 612 (1977).

This section does not control venue when a foreign corporation is doing business in this state and has a resident agent upon whom process may be served; this is so because venue cannot constitutionally be laid against a foreign corporation in any county where the venue would not be proper in a suit against a domestic corporation or a resident individual. *Zolper v. AT & T Info. Sys.*, 289 Ark. 27, 709 S.W.2d 74 (1986).

Foreign Surety.

Where no venue is fixed by a statute provided for a contractor's bond, an action against the foreign surety on the bond has venue established under this section. *Pacific Ins. Co. v. Drodgy*, 240 Ark. 535, 400 S.W.2d 673 (1966).

Venue Established.

The residence of the beneficiary on the surety bond and the county in which the loss occurred are sufficient to establish

venue on a subcontractor's complaint against a surety. *Ray Ross Constr. Co. v. Raney*, 266 Ark. 606, 587 S.W.2d 46 (1979).

Cited: *Simms Oil Co. v. Jones*, 192 Ark.

189, 91 S.W.2d 258 (1936); *Millsap v. Williams*, 236 Ark. 416, 366 S.W.2d 705 (1963); *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 437 S.W.2d 459 (1969).

16-60-109. Contract actions against nonresident.

(a) Contract actions against a nonresident of this state or a foreign corporation may be brought in the county in which the plaintiff resided at the time the cause of action arose.

(b) Venue provided in this section shall be cumulative, and this section shall in no way repeal or modify any other existing venue statute.

History. Acts 1973, No. 142, §§ 1, 2; A.S.A. 1947, §§ 27-619, 27-620.

CASE NOTES

ANALYSIS

Constitutionality.

Applicability.

Action against several defendants.

Breach of warranties.

Foreign corporations.

Constitutionality.

Inasmuch as a suit against a domestic corporation must be brought in the county where the corporation has its principal office or place of business, or where the chief officer resides, this section, which allows contract actions against foreign corporations to be brought in the county in which the plaintiff resided at the time the cause of action arose, discriminates against foreign corporations in violation of the equal protection clause of the Fourteenth Amendment. *Philco-Ford Corp. v. Holland*, 261 Ark. 404, 548 S.W.2d 828 (1977); but see *Farmers Bank v. Fuqua Homes, Inc.*, 259 Ark. 38, 531 S.W.2d 23 (1975).

Applicability.

This section does not apply to foreign corporations that have qualified to do business in Arkansas. *Equity Fire & Cas. Ins. Co. v. Coleman*, 326 Ark. 100, 928 S.W.2d 796 (1996).

Action Against Several Defendants.

Where Arkansas corporation county

brought contract action against two individual residents of another state and an individual resident of Arkansas, venue could not be properly laid in the county in which the corporation had its principal place of business if none of the defendants were served with process in that county. *Ozark Supply Co. v. Glass*, 261 Ark. 750, 552 S.W.2d 1 (1977).

Breach of Warranties.

Action by bank sounded in contract for breach of express and implied warranties and was thus within this section. *Farmers Bank v. Fuqua Homes, Inc.*, 259 Ark. 38, 531 S.W.2d 23 (1975).

Foreign Corporations.

Since the application of this section to a foreign corporation not qualified to do business in the state was not arbitrary nor a denial of equal protection so as to be unconstitutional, the foreign corporation had no standing to complain that this section made no distinction between foreign corporations qualified to do business in the state and those which were not. *Farmers Bank v. Fuqua Homes, Inc.*, 259 Ark. 38, 531 S.W.2d 23 (1975). But see *Philco-Ford Corp. v. Holland*, 261 Ark. 404, 548 S.W.2d 828 (1977).

Cited: *Helm v. Mid-America Indus., Inc.*, 301 Ark. 521, 785 S.W.2d 209.

16-60-110. Actions against person in penitentiary or asylum.

An action, other than one of those mentioned in §§ 16-60-101 — 16-60-103, against a person confined in the penitentiary or a facility for treatment for mental disease must be brought in the county in which he or she resided or claimed his or her residence prior to his confinement, unless otherwise provided by law.

History. Civil Code, § 91; C. & M. Dig., § 1170; Pope's Dig., § 1392; A.S.A. 1947, § 27-604; Acts 1989 (3rd Ex. Sess.), No. 56, § 1; 1997, No. 208, § 13.

A.C.R.C. Notes. Acts 1997, No. 208, § 1, codified as § 22-4-408, provided: "Legislative intent and purpose. The General Assembly hereby acknowledges that many of the laws relating to individuals

with disabilities are antiquated, functionally outmoded, derogatory, ambiguous or are inconsistent with more recently enacted provisions of the law. Consequently, it is the intent of the General Assembly and the purpose of this Act to clarify the relevant chapters of Titles 1, 6, 9, 13, 14, 16, 17, 20, 22, 23, and 27 of the Arkansas Code Annotated of 1987."

16-60-111. Actions on debt, account, or note.

(a) An action on a debt, account, or note, or for goods or services may be brought in the county where the defendant resided at the time the cause of action arose.

(b) In all such actions, summons may be served upon the defendant in any county in this state.

(c) The provisions of this section are cumulative to the venue laws of the State of Arkansas and shall not amend or repeal any other laws unless expressly in conflict therewith.

History. Acts 1977, No. 401, §§ 1-3; A.S.A. 1947, §§ 27-621 — 27-623.

RESEARCH REFERENCES

Ark. L. Notes. Flaccus, Attorneys, You Are Now Clearly Covered: The Fair Debt Collection Practices Act, 1995 Ark. L. Notes 43.

UALR L.J. Survey of Arkansas Law, Civil Procedure, 1 UALR L.J. 131.

CASE NOTES

ANALYSIS

Applicability.

Principal place of business.

Real action.

Applicability.

When two actions are pled which would lie in different venues, venue is determined by the real character of the action, that is, the principal right being asserted; where the cause of action is based on nonpayment of a debt or breach of contract, resulting in property damage, those

causes of action must be brought in the county of the defendant's residence or where the defendant is summoned, under this section and § 16-60-116(a), rather than as provided in § 16-60-113. *Fraser Bros. v. Darragh Co.*, 316 Ark. 297, 871 S.W.2d 367 (1994).

Principal Place of Business.

County where defendant had its principal place of business when cause of action arose was where venue was proper. *Pulpwood Suppliers, Inc. v. First Nat'l Bank*, 21 Ark. App. 147, 729 S.W.2d 425 (1987).

Real Action.

Where the plaintiffs brought an action in both tort and contract against the contractor and subcontractors for improper construction of parking lot, action was properly brought in a county in which at least one of the defendants was a resident rather than in the county in which the parking lot was located, because the allegation of damage and prayer for relief showed that the real action was on the contract. *Frank A. Rogers & Co. v.*

Whitmore, 275 Ark. 324, 629 S.W.2d 293 (1982).

Cited: *Ray Ross Constr. Co. v. Raney*, 266 Ark. 606, 587 S.W.2d 46 (1979); *Heber Springs Lawn & Garden, Inc. v. FMC Corp.*, 275 Ark. 260, 628 S.W.2d 563 (1982); *Helm v. Mid-America Indus., Inc.*, 301 Ark. 521, 785 S.W.2d 209; *Loewer v. National Bank*, 311 Ark. 354, 844 S.W.2d 329 (1992); *Ison Props., LLC v. Wood*, 85 Ark. App. 443, 156 S.W.3d 742 (2004).

16-60-112. Actions for personal injury or death.

(a) All actions for damages for personal injury or death by wrongful act shall be brought in the county where the accident occurred which caused the injury or death, or in the county where the person injured or killed resided at the time of injury.

(b) All civil actions for the recovery of damages brought against a nonresident of the State of Arkansas may be commenced in the county where the accident occurred which caused the injury or death or in the county where the person injured or killed resided at the time of the injury.

(c) Actions for damages for personal injury or death by wrongful act, where the accident which caused the injury or death occurred outside this state, shall be brought in the county in this state where the person injured or killed resided at the time of injury or in any county in which the defendant, or one (1) of several defendants, resides or is summoned.

History. Acts 1939, No. 314, § 1; 1947, No. 347, § 1; 1961, No. 137, § 1; A.S.A. 1947, §§ 27-610, 27-610.1, 27-612.

RESEARCH REFERENCES

Ark. L. Rev. Legislation — No. 137 — Venue Where Out of State Accident Gives Rise to Personal Injury or Wrongful Death Action, 15 Ark. L. Rev. 436.

Note, The Reach of the Long-Arm After

Malone & Hyde, Inc. v. Chisley: Still a “Vague and Tangled” Area of the Law?, 47 Ark. L. Rev. 209.

UALR L.J. Arkansas Law Survey, Nelson, Conflicts of Law, 7 UALR L.J. 173.

CASE NOTES

ANALYSIS

- In general.
- Purpose.
- Applicability.
- Abuse of process, etc.
- Accident.
- Actions arising out-of-state.
- Conspiracy regarding employment.
- Contracts.
- Corporate actions.

- Defamation.
- Effective date.
- Federal court actions.
- Jurisdiction.
- Multiple counties.
- Other legislation.
- Personal injury.
- Residence.
- State highway police officers.
- Subrogation.

Tortious interference.
Writ of prohibition.

In General.

This section does not apply to an action for abuse of prosecution, malicious prosecution, vexatious suit, and false imprisonment. *Arkansas Valley Indus., Inc. v. Roberts*, 244 Ark. 432, 425 S.W.2d 298 (1968).

Chapter 101 of Title 27 vests jurisdiction in the various circuit courts to try criminal offenses only and the legislature did not intend to preempt this section as to jurisdiction and venue for the redress of a civil wrong. *Garrett v. Galloway*, 263 Ark. 460, 565 S.W.2d 432 (1978).

When a complaint asserts both local and transitory causes of action the venue is determined by the principal purpose of the action. *Farm Bureau Mut. Ins. Co. v. Southall*, 281 Ark. 141, 661 S.W.2d 383 (1983), *aff'd* on other grounds, 238 Ark. 335, 676 S.W.2d 228 (1984).

Purpose.

Though emergency clause was not adopted for the reason that it did not receive the vote of two-thirds the members of the house, as required by the Constitution, Supreme Court may read the emergency clause in determining the legislative intent in passing the bill. *Missouri P.R.R. v. Kincannon*, 203 Ark. 76, 156 S.W.2d 70 (1941).

Applicability.

Corporeal or physical injuries must exist before venue can be established under this section. *Tilmon v. Perkins*, 292 Ark. 553, 731 S.W.2d 212 (1987).

Although a fraud action was pled, where plaintiffs' primary purpose was to recover damages for personal injury suffered due to the use of the implants during their breast-augmentation procedures, the mandatory provisions of subsection (a) of this section had to be applied rather than § 16-60-113(b). *Bristol-Meyers Squibb Co. v. Saline County Circuit Court*, 329 Ark. 357, 947 S.W.2d 12 (1997).

Abuse of Process, Etc.

Venue in an action for abuse of process, malicious prosecution, and vexatious suit is controlled by general venue statutes or principles rather than this section. *B-W Acceptance Corp. v. Colvin*, 252 Ark. 306, 478 S.W.2d 755 (1972).

Accident.

The word "accident" is not used in this

statute in a metaphysical sense, but as commonly employed and usually understood, and it means the incident or the wrongful act which caused the injury. *Coca-Cola Bottling Co. v. Kincannon*, 202 Ark. 235, 150 S.W.2d 193 (1941); *Heller v. Williams*, 204 Ark. 72, 160 S.W.2d 883 (1942).

The word "accident" as used in this section means the incident or the wrongful act which caused the injury and it includes an assault. *Shultz v. Young*, 205 Ark. 533, 169 S.W.2d 648 (1943).

The "accident which caused the injury" includes the alleged wrongful conduct of a doctor. *Goodwin v. Harrison*, 300 Ark. 474, 780 S.W.2d 518 (1989).

Actions Arising Out-of-State.

This section was intended to apply only to causes of action originating in this state. *Missouri P.R.R. v. Kincannon*, 203 Ark. 76, 156 S.W.2d 70 (1941).

This section localized causes of actions originating in this state, and has no application to causes of action arising in some other state. *Chambers v. Gray*, 203 Ark. 858, 158 S.W.2d 926 (1942).

Conspiracy Regarding Employment.

Action by former employee against former employer and others, charged with conspiracy as result of which plaintiff was wrongfully discharged from his employment might properly be brought in county in which employer was legally summoned, although cause of action did not arise in that county and neither plaintiff nor either one of employer's codefendants resided therein. *Robinson v. Missouri Pac. Transp. Co.*, 218 Ark. 390, 236 S.W.2d 575 (1951).

Where an employee brought suit against her employer alleging an intentional, wrongful discharge in violation of public policy and the Workers' Compensation Act, resulting in loss of income, mental anguish, physical and mental pain and suffering, the complaint essentially alleged simply a wrongful discharge; therefore, this section was not applicable. *Odell v. Arkansas Gen. Indus. Co.*, 288 Ark. 356, 705 S.W.2d 438 (1986).

Contracts.

The application of this section is not restricted to tort actions but may apply also to contract actions where the requisites of the section have been met, and

whether these requisites have been met is a question for the trial court after introduction of testimony. *Hot Springs Sch. Dist. No. 6 v. Surface Combustion Corp.*, 222 Ark. 591, 261 S.W.2d 769 (1953).

Corporate Actions.

Where a corporation resides in one county and an injury for which it is sued occurs in another county, this section takes precedence over § 16-60-104, and thus the proper county for venue is where the injury occurred. *Forrest City Mach. Works, Inc. v. Colvin*, 257 Ark. 889, 521 S.W.2d 206 (1975).

If this section is inconsistent with the venue statute which pertains to domestic corporations (§ 16-60-104), it is only inconsistent insofar as actions for personal injury or death caused by a wrongful act are concerned and in that case this section applies. *Arkansas Bank & Trust Co. v. Erwin*, 300 Ark. 599, 781 S.W.2d 21 (1989).

Defamation.

A defamation suit is not one for personal injury and thus venue cannot be established under this section. *Belin v. West*, 315 Ark. 61, 864 S.W.2d 838 (1993).

Effective Date.

This section, having no emergency clause, did not become effective until December 5, 1940, 30 days after the referendum election and was inapplicable to case tried prior to that date. *Fort Smith Couch & Bedding Co. v. Rozell*, 203 Ark. 35, 155 S.W.2d 707 (1941).

Federal Court Actions.

An action for wrongful death and an action for personal injuries brought in the federal district court because of diversity of citizenship should be brought in the district and division where the collision occurred. *Ard v. Lamensdorf*, 272 F. Supp. 268 (E.D. Ark. 1967).

Jurisdiction.

This section is a venue statute and is not to be regarded as an attempt to give Arkansas courts jurisdiction over a non-resident motorist involved in an out-of-state collision. This section assumes that jurisdiction exists over the defendant, and where that is so, the statute gives the plaintiff a choice of forums. *Carter v. Wilson*, 279 Ark. 58, 648 S.W.2d 472 (1983).

Multiple Counties.

Where plaintiff resided in one county and accident occurred in another county, and action for injuries was instituted in a third county where defendant had a resident agent, court of the third county should have treated defendant's motion to dismiss as one for change of venue and removed cause to either of the other counties at the election of plaintiff. *Terminal Oil Co. v. Gautney*, 202 Ark. 748, 152 S.W.2d 309 (1941).

Suits found instituted in proper county and motion to transfer and consolidate them with action arising from same cause pending in another county was properly overruled. *Kornegay v. Auten*, 203 Ark. 687, 158 S.W.2d 473 (1942).

Where child was injured in one county but the wrongful conduct of the doctor for which the child's father brought suit occurred in another county, this section conferred no authority for the father to sue the doctor in the county of injury upon service had on him in another county. *Heller v. Williams*, 204 Ark. 72, 160 S.W.2d 883 (1942).

Where owner of car number one sues owner of car number two for personal injuries, but fails to make guest in car number two a party defendant, and guest sues owner of car number one in another county, guest was entitled to writ of prohibition against court in first county from trying case as against him, as county in which case is first filed has exclusive jurisdiction. *Sims v. Toler*, 214 Ark. 732, 217 S.W.2d 928 (1949).

Where occupant of bus, after settlement with truck owner, filed suit for damages against owners of bus involved in accident with the truck, and suit was filed in county where occupant resided, court had jurisdiction to entertain third party complaint filed by bus owners against defendant owner of truck, as in the same venue as that of the original action by the occupant. *Lacewell v. Griffin*, 214 Ark. 909, 219 S.W.2d 227 (1949).

An action commenced by plaintiffs could properly be maintained even though the action was instituted after an action relating to this action had been commenced in another county, even though inconsistent judgments might result. *Davis v. Golden*, 223 Ark. 143, 264 S.W.2d 833 (1954).

While an administrator in an original action for wrongful death of his decedent

must file suit in certain counties, his only recourse when an action is instigated against him in still another county by a claimant as a result of the same accident is by cross complaint in the suit which is first filed and service first procured. *Carpenter v. Baskin*, 224 Ark. 315, 273 S.W.2d 25 (1954).

Where case is brought in county as prescribed in this section, the venue is in the county and one of parties involved cannot thereafter bring suit in one of the other counties authorized and have entire suit tried in latter county under doctrine of *forum non conveniens*. *Hicks v. Wolfe*, 228 Ark. 406, 307 S.W.2d 784 (1957).

Where actions on the same cause are brought in more than one county having venue, the one first acquiring service of summons on his adversary has the right to litigate his claim or portion of the lawsuit in the jurisdiction or venue of his choice. *Talley v. Morphis*, 232 Ark. 91, 334 S.W.2d 652 (1960).

Venue of action was fixed as being the action first filed. *Barkley v. Cullum*, 252 Ark. 474, 479 S.W.2d 535 (1972).

Other Legislation.

The purpose of this section is to require personal injury actions to be brought in the county where the injury occurred or in the county where the plaintiff resides, and it repeals so much of § 16-60-116(a) as previously permitted them to be brought in any county where service might be had on the defendant. *Fort Smith Gas Co. v. Kincannon*, 202 Ark. 216, 150 S.W.2d 968 (1941).

This section supersedes § 16-60-104 with respect to personal injury actions. *Forrest City Mach. Works, Inc. v. Colvin*, 257 Ark. 889, 521 S.W.2d 206 (1975).

The legislature did not intend to preempt this section by enactment of Acts 1959, No. 453 as to jurisdiction and venue for the redress of a civil wrong. *Garrett v. Galloway*, 263 Ark. 460, 565 S.W.2d 432 (1978).

Personal Injury.

The clause "where the accident occurred which caused the injury or death" is to be read and interpreted in connection with the remainder of the sentence of which it is a part; the section is not limited to traumatic injuries, but covers wrongful acts from which personal injury results.

Coca-Cola Bottling Co. v. Kincannon, 202 Ark. 235, 150 S.W.2d 193 (1941).

Complaint alleging that plaintiff by reason of drinking contents of a bottle of beverage became ill and suffered stated injuries to her stomach was held to allege a personal injury within the meaning of this section. *Coca-Cola Bottling Co. v. Kincannon*, 202 Ark. 235, 150 S.W.2d 193 (1941).

Malpractice of a doctor was held a personal injury within the meaning of this section, to compensate which the injured party has the right to sue either in the county where he resided at the time of the injury or in the county where the injury occurred. *Heller v. Williams*, 204 Ark. 72, 160 S.W.2d 883 (1942).

The place of a traffic accident determined venue under this section rather than the place of bailment to a known incompetent driver. *Moore v. Coit*, 224 Ark. 490, 274 S.W.2d 651 (1955).

The venue of an action for damages for personal injuries resulting from breach of an implied warranty of product fitness is in the county where the injuries were received. *Evans Labs., Inc. v. Roberts*, 243 Ark. 987, 423 S.W.2d 271 (1968).

While the reference in this section to "where the accident occurred" does not require a trauma or blow in the literal sense, a physical or bodily injury is required in order for this section to apply. Thus, defamation, abuse of process, false imprisonment, malicious prosecution, and the like, though tortious in origin, do not come within this section. *Odell v. Arkansas Gen. Indus. Co.*, 288 Ark. 356, 705 S.W.2d 438 (1986).

Residence.

Residence does not necessarily mean one's permanent abode or legal residence or domicile. *Norton v. Purkins*, 203 Ark. 586, 157 S.W.2d 765 (1942).

Plaintiff found to be resident of county, allowing him to bring suit in that county. *Southern Compress Co. v. Elston*, 204 Ark. 180, 161 S.W.2d 202 (1942); *Murry v. Circuit Court*, 230 Ark. 132, 320 S.W.2d 940 (1959).

Where county is divided into two districts, each district is considered a separate county and when plaintiff resided in one district it was proper to bring action in that district for personal injury although defendant resided in the other district.

Smith v. Waggoner, 212 Ark. 345, 205 S.W.2d 465 (1947).

Plaintiff found not to be resident of county where he was employed in an ordnance plant and where he had been assigned quarters in the naval barracks upon a showing that he maintained a dwelling house for his wife and children in another county. *Burbridge v. Redman*, 211 Ark. 236, 200 S.W.2d 492 (1947); *Missouri P.R.R. v. Lawrence*, 215 Ark. 718, 223 S.W.2d 823 (1949).

Action should be filed in county where plaintiff actually resided, regardless of where his domicile might be. *Missouri P.R.R. v. Lawrence*, 215 Ark. 718, 223 S.W.2d 823 (1949).

The word "residency," as used in this section, means just that; it does not mean domicile. *Goodwin v. Harrison*, 300 Ark. 474, 780 S.W.2d 518 (1989).

This section fixes the time of residency at the time of injury, but the General Assembly chose not to use that language in § 16-60-113(b), and provided there that suit can be brought in the county where any plaintiff resides. *Quinney v. Pittman*, 320 Ark. 177, 895 S.W.2d 538 (1995).

State Highway Police Officers.

This section did not change the venue as provided by § 16-106-101(d) for actions against state officers, so that two state highway police officers were entitled to an injunction against hearing by the trial court of a suit for damages against the two police officers, when the action was filed in the county where the alleged assault took place, as proper venue was Pulaski County, the official county residence for all state police. *Downey v. Toler*, 214 Ark. 334, 216 S.W.2d 60 (1948).

Subrogation.

Section 23-89-101 is a subrogation statute, and the action permitted by it is contractual in nature and not for personal injury; thus, venue is determined not by

this section but by § 16-60-116 or § 23-79-204. *Equity Fire & Cas. Ins. Co. v. Coleman*, 326 Ark. 100, 928 S.W.2d 796 (1996).

Tortious Interference.

Tortious interference with a business interest is not a personal injury claim under subsection (a) of this section. *Belin v. West*, 315 Ark. 61, 864 S.W.2d 838 (1993).

Writ of Prohibition.

The jurisdiction of the circuit court was questioned by the motion to quash and dismiss, on the grounds that the deceased was not a resident of that county. The circuit judge had a right to determine the question and the defendant has an adequate remedy at law by an appeal and a writ of prohibition would not lie. *Twin City Lines v. Cummings*, 212 Ark. 569, 206 S.W.2d 438 (1947).

Prohibition is not the proper remedy when the trial court's jurisdiction depends on a disputed question of fact, and where the trial judge concluded that venue lies in the county by virtue of plaintiff's residence, the court on appeal would not say that petitioner had discharged burden of proving respondent was not a resident of the county. *Belford v. Taylor*, 241 Ark. 220, 406 S.W.2d 868 (1966).

Cited: *Home Ice Co. v. Bone*, 204 Ark. 448, 162 S.W.2d 563 (1942); *Capital Transp. Co. v. Strait*, 213 Ark. 571, 211 S.W.2d 889 (1948); *Shrieves v. Yarbrough*, 220 Ark. 256, 247 S.W.2d 193 (1952); *Simmons v. Broomfield*, 163 F. Supp. 268 (W.D. Ark. 1958); *Deason v. Groendyke Transp., Inc.*, 176 F. Supp. 346 (W.D. Ark. 1959); *Rome v. Ahlert*, 231 Ark. 844, 332 S.W.2d 809 (1960); *Davis v. Colvin*, 238 Ark. 968, 385 S.W.2d 944 (1965); *Southwestern Bell Tel. Co. v. Roberts*, 246 Ark. 864, 440 S.W.2d 208 (1969); *Peel v. Kelley*, 268 Ark. 90, 594 S.W.2d 11 (1980); *Hooper v. Zajac*, 275 Ark. 5, 627 S.W.2d 2 (1982); *Tucker Enters., Inc. v. Hartje*, 278 Ark. 320, 650 S.W.2d 559 (1983).

16-60-113. Actions for damage to, or conversion of, personal property — Actions for fraud.

(a) Any action for damages to personal property by wrongful or negligent act, whether arising from contract, tort, or conversion of personal property, may be brought:

- (1) In the county where the damage occurred;
- (2) In the county where the property was converted; or

(3) In the county of residence of the person who was the owner of the property at the time the cause of action arose.

(b) Any action for any type of fraud may be brought:

(1) In the county where any one (1) plaintiff resides or any one (1) defendant is located;

(2) In the county where one (1) or more of the acts utilized to induce, perpetuate, or conceal the fraud was performed; or

(3) In the county from which an act or one (1) or more of the fraudulent acts or part of a scheme to defraud was originated or was communicated from or into by telephone, mail, or other means orally or in writing.

History. Acts 1941, No. 317, § 1; 1947, 642, § 1; 1985, No. 921, § 1; A.S.A. 1947, No. 182, § 1; 1977, No. 830, § 1; 1983, No. § 27-611.

RESEARCH REFERENCES

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CASE NOTES

ANALYSIS

Construction.
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Construction.

Subsection (b) uses the present tense by providing that suit may be brought where one of the plaintiffs "resides"; it does not use the past tense, or refer to the county of residence "at the time the cause of action arose," as does subsection (a) of this section. The distinction between subsections (a) and (b) of this section was obviously intentional; it allows a plaintiff to file suit for fraud in the county of his residence at the time of the filing of the complaint, no matter where the fraud occurred. *Quinney v. Pittman*, 320 Ark. 177, 895 S.W.2d 538 (1995).

Although § 16-60-112 fixes the time of residency at the time of injury, the General Assembly chose not to use that language in subsection (b) of this section;

subsection (b) of this section uses the present tense, which indicates residency at the time the suit is filed. *Quinney v. Pittman*, 320 Ark. 177, 895 S.W.2d 538 (1995).

Purpose.

It was not the intent of the General Assembly to permit a plaintiff alleging an injury to an intangible, or an economic injury, to bring it in his home county. *Wilson-Pugh, Inc. v. Taylor*, 289 Ark. 102, 709 S.W.2d 93 (1986).

Applicability.

This section is a venue section which does not create or destroy any cause of action; it localizes causes of action originating in this state and has no application to causes of action arising in some other state. *Viking Freight Co. v. Keck*, 202 Ark. 663, 153 S.W.2d 166 (1941).

This section applies only to persons and not the state, and does not amend § 16-106-101(d); consequently, action filed by Commissioner of Revenues in Pulaski County, which was not the county of defendant's residence, was properly dismissed as being filed in the wrong county. *Cook v. Gore*, 214 Ark. 777, 218 S.W.2d 82 (1949).

This section applies to corporations as well as to individuals. *East Tex. Motor*

Freight Line v. Wood, 218 Ark. 211, 235 S.W.2d 882 (1951).

This section does not apply to suits for conversion of property, since it is limited to cases of physical injury to personal property. Terry v. Plunkett-Jarrell Grocery Co., 220 Ark. 3, 246 S.W.2d 415 (1952).

This section applies only where there has been personal injury or where there has been actual force or violence, and not where the cause of action is predicated on a breach of contract or implied warranty. International Harvester Co. v. Brown, 241 Ark. 452, 408 S.W.2d 504 (1966).

This section was not applicable to an action for damages for negligence in the repair of a truck. Sarratt v. Crouch Equip. Co., 245 Ark. 775, 434 S.W.2d 286 (1968).

This section is a general venue statute governing civil suits brought by persons for the recovery of damages to their property, and is inapplicable to an action brought on behalf of, or in the name of the state under §§ 16-60-103 or 16-106-101(d). Southwestern Bell Tel. Co. v. Roberts, 246 Ark. 864, 440 S.W.2d 208 (1969).

The 1947 amendment to this section, permitting an action for damages to personal property by wrongful or negligent act, refers only to damage caused by an accident involving force or violence. Hooper v. Zajac, 275 Ark. 5, 627 S.W.2d 2 (1982). But see Henderson Specialties, Inc. v. Boone County, 334 Ark. 111, 971 S.W.2d 234 (1998).

Where plaintiff filed an action against the defendant for damages, the owner's cause of action was only for a breach of contract and, therefore, section not applicable. Hooper v. Zajac, 275 Ark. 5, 627 S.W.2d 2 (1982), superseded by statute as stated in Fristsouth, P.A. v. Yates, 286 Ark. 82, 689 S.W.2d 532 (1985). But see Henderson Specialties, Inc. v. Boone County, 334 Ark. 111, 971 S.W.2d 234 (1998).

The Supreme Court has consistently limited the application of this section to actions involving actual force or violence; accordingly, where a breach of contract was alleged to have involved an accident, which may have been a result of either negligent or tortious conduct, but it was not alleged to have involved force or violence, this section was inapplicable. Beatty v. Ponder, 278 Ark. 41, 642 S.W.2d 891 (1982).

A suit for damages resulting from misrepresentations that brought about an unsound investment of money is not an action for damages to personal property for purposes of establishing venue under this section. Firstsouth v. Yates, 286 Ark. 82, 689 S.W.2d 532 (1985).

This section did not apply where damages to personal property were not alleged and prayed for in complaint. Tilmon v. Perkins, 292 Ark. 553, 731 S.W.2d 212 (1987).

When two actions are pled which would lie in different venues, venue is determined by the real character of the action, that is, the principal right being asserted; where the cause of action is based on nonpayment of a debt or breach of contract, resulting in property damage, those causes of action must be brought in the county of the defendant's residence or where the defendant is summoned, under § 16-60-111 and § 16-60-116(a), rather than as provided in this section. Fraser Bros. v. Darragh Co., 316 Ark. 297, 871 S.W.2d 367 (1994).

Subsection (b) applies to actions for constructive fraud. Quinney v. Pittman, 320 Ark. 177, 895 S.W.2d 538 (1995).

Although a fraud action was pled, where plaintiffs' primary purpose was to recover damages for personal injury suffered due to the use of the implants during their breast-augmentation procedures, the mandatory provisions of § 16-60-112(a) must be applied rather than subsection (b) of this section. Bristol-Meyers Squibb Co. v. Saline County Circuit Court, 329 Ark. 357, 947 S.W.2d 12 (1997).

Venue under subsection (a) may only be invoked in an action stating a claim for physical damage to tangible personal property, and is not applicable in an action alleging only economic injury. Premium Aircraft Parts, Inc. v. Circuit Court, 347 Ark. 977, 69 S.W.3d 849 (2002).

Conversion.

Where an automobile owner's complaint alleged that the defendants had converted some parts from his automobile and some other items of his personal property, the action could be brought in the county where the owner resided. Hooper v. Zajac, 275 Ark. 5, 627 S.W.2d 2 (1982), superseded by statute as stated in Fristsouth, P.A. v. Yates, 286 Ark. 82, 689 S.W.2d 532 (1985). But see Henderson Specialties,

Inc. v. Boone County, 334 Ark. 111, 971 S.W.2d 234 (1998).

The holder of a security interest in a crop may not bring an action for conversion of that interest in the county of his residence pursuant to this section. *Wilson-Pugh, Inc. v. Taylor*, 289 Ark. 102, 709 S.W.2d 93 (1986).

Corporations.

Corporation which by its articles designated a county as its principal office and maintained an office there was entitled to file suit in that county though it maintained another office in another county where articles had never been amended for purpose of changing its official residence though such action had been contemplated. *Woodruff Elec. Coop. Corp. v. Weis Butane Gas Co.*, 221 Ark. 686, 255 S.W.2d 420 (1953).

A foreign railroad corporation did not acquire residence for venue purposes in the county in which it had its headquarters and could not maintain an action in that county for damage to its property arising out of an accident which occurred in another county. *Missouri P.R.R. v. W.S. Fox & Sons*, 251 Ark. 247, 472 S.W.2d 726 (1971); *Missouri P.R.R. v. Light*, 251 Ark. 809, 475 S.W.2d 513 (1972).

Filing of Answer.

Filing of answer by defendant, without reserving any objection to the venue, gave court jurisdiction over subject matter and parties. *Crutchfield v. McLain*, 230 Ark. 147, 321 S.W.2d 217 (1959).

Fraud.

Constructive fraud was insufficiently pled under ARCP 9 to establish venue pursuant to subsection (b) of this section. *Evans Indus. Coatings, Inc. v. Chancery Court*, 315 Ark. 728, 870 S.W.2d 701 (1994).

Although subsection (b) allows a suit for fraud to be filed at the place of actual abode of one of the plaintiffs, this subchapter does not allow a plaintiff to file suit for economic damages as the result of a fraud in a county when the only connection with that county is the plaintiff's residence. *Quinney v. Pittman*, 320 Ark. 177, 895 S.W.2d 538 (1995).

Multiple Counties.

Where action for damages resulting from accident was first brought in county

where accident occurred, the county had jurisdiction and jurisdiction could not thereafter be obtained by court in county where parties resided on ground of forum non conveniens. *Hicks v. Wolfe*, 228 Ark. 406, 307 S.W.2d 784 (1957).

Where several actions are brought in more than one county having venue by parties to an accident, the one first acquiring service of summons on his adversary has the right to litigate his claim or portion of the lawsuit in the jurisdiction or venue of his choice. *Talley v. Morphis*, 232 Ark. 91, 334 S.W.2d 652 (1960).

Where a suit against the estate of a deceased was filed in one county and the summonses were placed in the hands of the sheriff at a time when a duly appointed and qualified administrator was acting and the administrator subsequently petitioned to resign and filed suit in a second county, the venue of the action was fixed as being the county of the action first filed. *Barkley v. Cullum*, 252 Ark. 474, 479 S.W.2d 535 (1972).

When two or more actions are pled that lie in different venues, venue is determined by the real character of the action and the principal right being asserted. *Bristol-Meyers Squibb Co. v. Saline County Circuit Court*, 329 Ark. 357, 947 S.W.2d 12 (1997).

Other Sections.

The only change in existing law made by this section was to permit the action to be brought in the county where the accident occurred which caused the damage. (Decision prior to 1947 amendment.) *Commercial Union Fire Ins. Co. v. Hansen*, 205 Ark. 612, 170 S.W.2d 1012 (1943).

This section is not inconsistent with and does not repeal § 16-60-116(c). *Commercial Union Fire Ins. Co. v. Hansen*, 205 Ark. 612, 170 S.W.2d 1012 (1943).

Place of Accident.

The place of a traffic accident determined venue under this section rather than the place of bailment to a known incompetent driver. *Moore v. Coit*, 224 Ark. 490, 274 S.W.2d 651 (1955).

Venue Proper.

A complaint sufficiently stated a claim for negligent construction, alleging that damage to the plaintiff's personal property occurred in Boone County, and, therefore, venue was proper in Boone County.

Henderson Specialties, Inc. v. Boone County, 334 Ark. 111, 971 S.W.2d 234 (1998).

Waiver.

This section is a venue statute in contradistinction to a jurisdictional statute and of course venue can be waived; therefore the requirements of this section may be waived. *Crutchfield v. McLain*, 230 Ark. 147, 321 S.W.2d 217 (1959).

Cited: *Waterman v. Jim Walter Corp.*,

245 Ark. 218, 431 S.W.2d 748 (1968); *Tucker Enters., Inc. v. Hartje*, 278 Ark. 320, 650 S.W.2d 559 (1983); *Zolper v. AT & T Info. Sys.*, 289 Ark. 27, 709 S.W.2d 74 (1986); *Superior Mktg. Research Corp. v. Purifoy*, 296 Ark. 156, 752 S.W.2d 277 (1988); *Prairie Implement Co. v. Circuit Court*, 311 Ark. 200, 844 S.W.2d 299 (1992); *Reeves v. Hinkle*, 326 Ark. 724, 934 S.W.2d 216 (1996); *SEECO, Inc. v. Hales*, 341 Ark. 673, 22 S.W.3d 157 (2000).

16-60-114. Contract actions by resident subcontractor, supplier, or materialman against nonresident prime contractor or subcontractor — Affidavit of contractor.

(a) Contract actions by a resident subcontractor, supplier, or materialman against a prime contractor or subcontractor who is a nonresident of this state or who is a foreign corporation may be brought in the county in which the plaintiff resided at the time the cause of action arose.

(b) When any judgment is recovered in an action against the nonresident, the prevailing party shall be entitled to an attorney's fee in the amount to which he or she is entitled by contract or, if no amount is fixed, a reasonable compensation for the services rendered by the attorney on behalf of the prevailing party.

(c) The prevailing party shall also be entitled to recover costs and fees paid, as well as interest at the rate of ten percent (10%) on the balance due from the date the prime contractor received his or her final payment.

(d)(1) All foreign corporations providing services in this state shall furnish, prior to receiving payment for their services, or in the case of installment payment prior to receiving the last installment, a sworn affidavit to the person or entity employing the foreign corporations stating that all subcontractors have been paid in full.

(2) Any person signing such a sworn affidavit when in fact all subcontractors have not been paid in full shall be deemed guilty of a Class D felony.

History. Acts 1981, No. 922, §§ 1-4; 1983, No. 38, § 1; A.S.A. 1947, §§ 27-624 — 27-627.

Publisher's Notes. In *Philco-Ford Corp. v. Holland*, 261 Ark. 404, 548 S.W.2d 828 (1977), the Arkansas Supreme Court held that § 16-60-109, which contains venue provisions similar to those of this section, is unconstitutional in that it discriminates against foreign corporations in violation of the equal protection

clause of the U.S. Constitution. The court reasoned that foreign and domestic corporations must be treated alike; since actions against domestic corporations are not brought in the county of the plaintiff's residence (see § 16-60-104), the statute could not validly require that actions against foreign corporations be brought in such county. It appears that the court's reasoning would apply equally to the provisions of this section.

16-60-115. Action by insured or beneficiary against surety on contractor's performance bond.

An action brought in this state by or in behalf of an insured or beneficiary against a domestic or foreign surety on a contractor's payment or performance bond may be brought in the county:

- (1) In which the loss occurred;
- (2) Of the insured's residence at the time of loss; or
- (3) Of the beneficiary's residence at the time of loss.

History. 1983, No. 39, § 1; A.S.A. 1947, § 27-628; Acts 2005, No. 2258, § 1.

Amendments. The 2005 amendment substituted "payment or" for "payment of" in the introductory paragraph.

Cross References. Actions on bonds generally, § 16-107-101.

CASE NOTES

Cited: Glick v. Ballentine Produce, Inc., Ins. Co. v. Lovins, 248 F. Supp. 108 (E.D. 343 F.2d 839 (8th Cir. 1965); MFA Mut. Ark. 1965).

16-60-116. Other actions — County where defendant resides or is summoned — Effective service.

(a) Every other action may be brought in any county in which the defendant or one (1) of several defendants resides or is summoned.

(b) Where any action embraced in subsection (a) of this section is against a single defendant, the plaintiff shall not be entitled to judgment against him or her on the service of a summons in any other county than that in which the action is brought, unless he or she resided in that county at the commencement of the action or unless, having appeared in the action, he or she fails to object before the trial to its proceeding against him or her.

(c) Where any action embraced in subsection (a) of this section is against several defendants, the plaintiff shall not be entitled to judgment against any of them on the service of summons in another county than that in which the action is brought, where no one of the defendants is summoned in that county or resided in that county at the commencement of the action, or where, if any of them resided or were summoned in that county, the action is discontinued or dismissed as to them, or judgment in the action is rendered in their favor, unless the defendant summoned in another county, having appeared in the action, failed to object before the judgment to its proceeding against him.

(d) The objection that one (1) of several defendants was summoned in another county shall be deemed to be waived if he or she appears, unless it is made before judgment as to that defendant.

(e) If after the commencement of an action in the county of the defendant's residence, he or she moves therefrom, the service of a summons upon him or her in any other county shall have the same effect as if it had been made in the county from which he or she moved.

History. Civil Code, §§ 96-100; C. & M. Dig., §§ 1176-1180; Pope's Dig., §§ 1398-1402; A.S.A. 1947, §§ 27-613 — 27-617.

RESEARCH REFERENCES

Ark. L. Rev. Note, The Law of Defamation: An Arkansas Primer, 42 Ark. L. Rev. 915.

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In General.

When a complaint asserts both local and transitory causes of action the venue is determined by the principal purpose of the action. *Farm Bureau Mut. Ins. Co. v. Southall*, 281 Ark. 141, 661 S.W.2d 383 (1983), *aff'd* on other grounds, 238 Ark. 335, 676 S.W.2d 228 (1984).

A transitory action may be brought in any county in which the defendant may be found. *Wilkerson v. First Nat'l Bank*, 282 Ark. 352, 668 S.W.2d 941 (1984).

Since statehood, the General Assembly has provided that the basic rule of venue is that a defendant must be sued in the

county where he lives or is summoned. *Quinney v. Pittman*, 320 Ark. 177, 895 S.W.2d 538 (1995).

Judicial economy is not elevated over the right of a defendant to be tried "at home" except in instances where venue statutes, as interpreted in precedents, permit a trial elsewhere. *Steve Standridge Ins., Inc. v. Langston*, 321 Ark. 331, 900 S.W.2d 955 (1995).

Construction.

In listing the alternative venues for fraud in subsection (b), the General Assembly followed the recognized rule of grammar that a list of items followed by commas and ending with the word "or" between the final two items shall be read in the disjunctive; the current version thus provides three separate venues for fraud. *Quinney v. Pittman*, 320 Ark. 177, 895 S.W.2d 538 (1995).

The phrase "is summoned" in subsection (a) should be read to mean "is served." *Brown v. Texarkana Nat'l Bank*, 889 F. Supp. 351 (E.D. Ark. 1992).

Purpose.

The purpose underlying state venue laws is to fix venue in the county of the defendant's residence unless for policy reasons, there is a statutory exception. *Prairie Implement Co. v. Circuit Court*, 311 Ark. 200, 844 S.W.2d 299 (1992).

Applicability.

Venue for action held within this section. *Tilmon v. Perkins*, 292 Ark. 553, 731 S.W.2d 212 (1987).

Where neither of the child's parents resided in the county when grandparents filed an action and the child's father had asserted no interest in exercising or enforcing his visitation rights, under these circumstances, the county chancery court clearly had venue of the grandparents' action pursuant to this section which al-

lowed the action to be brought where the defendant-mother was residing. *Sanders v. Sanders*, 297 Ark. 621, 764 S.W.2d 443 (1989).

When two actions are pled which would lie in different venues, venue is determined by the real character of the action, that is, the principal right being asserted; where the cause of action is based on nonpayment of a debt or breach of contract, resulting in property damage, those causes of action must be brought in the county of the defendant's residence or where the defendant is summoned, under § 16-60-111 and subsection (a) of this section, rather than as provided in § 16-60-113. *Fraser Bros. v. Darragh Co.*, 316 Ark. 297, 871 S.W.2d 367 (1994).

Breach of Warranty.

Venue in an action for breach of contract or breach of implied warranty is governed by this section and not § 16-60-113. *International Harvester Co. v. Brown*, 241 Ark. 452, 408 S.W.2d 504 (1966).

This section does not apply to an action for personal injuries resulting from breach of an implied warranty of product fitness. *Evans Labs., Inc. v. Roberts*, 243 Ark. 987, 423 S.W.2d 271 (1968).

Corporations.

This section must be read in connection with statute providing that word person includes a corporation as well as a natural person, and, when so read, corporations come within its terms. *Harger v. Oklahoma Gas & Elec. Co.*, 195 Ark. 107, 111 S.W.2d 485 (1937), cert. denied, 304 U.S. 569, 58 S. Ct. 1038, 82 L. Ed. 1534 (1938).

Venue cannot be fixed against a foreign corporation unless it is served in the county or is a resident in the county wherein the action is brought. *B-W Acceptance Corp. v. Colvin*, 252 Ark. 306, 478 S.W.2d 755 (1972).

In an action by a buyer against an Arkansas seller and nonresident manufacturer, venue was appropriate only in the county where the corporate seller had its principal place of business, and a writ of prohibition would be issued to bar venue in the county of the buyer's residence, despite the fact that the nonresident corporate manufacturer subject to the long-arm statute could possibly have been sued in the county of the buyer's residence. *Tucker Enters., Inc. v. Hartje*, 278 Ark. 320, 650 S.W.2d 559 (1983).

Because the buyer failed to produce any facts to support its venue argument, and because this section and § 16-58-125 supported venue for the action in Cleburne County, the trial court correctly denied the buyer's motion to dismiss on the basis of venue. *Ison Props., LLC v. Wood*, 85 Ark. App. 443, 156 S.W.3d 742 (2004).

Deception.

Where defendant was induced by deception to come within a certain county and be served with process there, service ought to be quashed. *Robinson v. Bossinger*, 195 Ark. 445, 112 S.W.2d 637 (1938).

Default Judgment.

Promissory note executed by debtor to remove a lien created by the default judgment which was void for lack of proper service was invalid. *Federal Land Bank v. Wilson*, 533 F. Supp. 301 (E.D. Ark. 1982), aff'd, 719 F.2d 1367 (8th Cir. 1983).

Foreign Judgments.

Foreign judgment was properly registered in county where defendant was summoned although he claimed residency in another county. *Wilkerson v. First Nat'l Bank*, 282 Ark. 352, 668 S.W.2d 941 (1984).

Fraternal Benefit Societies.

Provision exempting fraternal benefit societies from insurance laws did not make this section applicable to fraternal benefit societies. *Grand Court v. Carter*, 184 Ark. 819, 43 S.W.2d 531 (1931).

A fraternal benefit society is not exempt from suit outside of the county of its domicile or principal place of business. *Grand Court v. Carter*, 184 Ark. 819, 43 S.W.2d 531 (1931).

Jurisdiction.

A suit on a promissory note against maker and payee may be brought in northern district of county where payee resides and maker may be served in southern district where he resides. *Murrell v. Exchange Bank*, 168 Ark. 645, 271 S.W. 21 (1925).

The court having jurisdiction of suit to foreclosure chattel mortgage had, as an incident thereto, power to appoint a receiver to take charge of the mortgaged property; parties interfering with this jurisdiction by converting the subject matter thereof became subject to it and the

court had power to direct its process to any part of the state for service for the purpose of preserving its jurisdiction. *Beeson v. Chambers*, 192 Ark. 265, 90 S.W.2d 770 (1936).

The general rule is that where in a suit for specific performance of a contract involving land plaintiff seeks only in personam relief against defendant and does not seek a decree which by virtue of in rem statutes will act on the title to the land itself, the action is considered to be in personam and transitory, and statutes like this section are inapplicable; thus, under this general rule such an action may be maintained in any jurisdiction where service on defendant can be obtained. *Cobb v. National Lead Co.*, 215 F. Supp. 48 (E.D. Ark. 1963).

With respect to transitory actions commenced originally in federal court solely on the basis of diversity of citizenship, venue is determined by the provisions of 28 USC § 1391(a), and state venue statutes are not applicable. *Cobb v. National Lead Co.*, 215 F. Supp. 48 (E.D. Ark. 1963).

Separate districts of a county must be treated as separate counties. *Prairie Implement Co. v. Circuit Court*, 311 Ark. 200, 844 S.W.2d 299 (1992).

Miscellaneous Actions.

Where a debtor and a creditor are residents of the same state, an attempt of the latter to evade the exemption laws of the state of their domicile by bringing suits in another state, although apparently legal in form, is an abuse of process justifying the restraining power of a court of chancery. *State ex rel. Little Rock Bar Ass'n.*, 101 Ark. 210, 142 S.W. 194 (1911).

An action on account for merchandise may be brought in any county in which the defendant or one of several defendants resides or is summoned. *Doyle-Kidd Dry Goods Co. v. Munn*, 151 Ark. 629, 238 S.W. 40 (1922).

An action against an administrator for negligence of his intestate could be brought in any county where service could be had on the administrator, and could not be brought in the county in which he was appointed unless he was served there. *Baker v. Puckett*, 182 Ark. 265, 31 S.W.2d 286 (1930). See *Barnes v. Balz*, 173 Ark. 417, 292 S.W. 391 (1927).

Plaintiff's cause of action for injuries sustained in automobile collision in an-

other state is a transitory cause of action upon which plaintiff may sue in any jurisdiction where service may be had. *Chambers v. Gray*, 203 Ark. 858, 158 S.W.2d 926 (1942).

Where plaintiff in suit for alienation of his wife's affections filed suit in his own county against defendants located in another county and secured a default judgment, trial court properly set judgment aside on motion of defendants appearing specially, as venue in suit for alienation of affections must be brought in county of defendants. *Obennoskey v. Pennington*, 214 Ark. 892, 218 S.W.2d 711 (1949).

Action by former employee against former employer and others for conspiracy might properly be brought in county in which employer was legally summoned, although cause of action did not arise in that county and neither plaintiff nor either one of employer's codefendants resided therein. *Robinson v. Missouri Pac. Transp. Co.*, 218 Ark. 390, 236 S.W.2d 575 (1951).

This section governed the venue of an action to increase payments to the beneficiary of a testamentary trust. *Thompson v. Dunlap*, 244 Ark. 178, 424 S.W.2d 360 (1968).

Where defendant was a resident of one county and service of summons was upon her there, that county was the correct venue of an action of malicious prosecution against her. *Carney v. Cummings*, 258 Ark. 362, 524 S.W.2d 623 (1975).

Where a plaintiff brought an action to quiet title against the landowners and a subsequent lessee, the complaint was local in nature and the plaintiff oil company properly filed the action in the county where the land was located; that same venue was proper for both a compulsory counterclaim filed by the defendant and a permissive third party complaint, since both claims involved the same cause of action as the original complaint and had common questions of law and fact. *Wasp Oil, Inc. v. Arkansas Oil & Gas, Inc.*, 280 Ark. 420, 658 S.W.2d 397 (1983).

Where neither the director nor the keeper of the records of the Department of Correction was located in the county where the plaintiff/appellant filed his suit to recalculate his parole eligibility date, he was not entitled to any relief in that court. *Wiggins v. State*, 299 Ark. 180, 771 S.W.2d 759 (1989).

—Attorney's Fees.

Even though petitioner argued that venue was improper under subsection (a) of this section because he neither resided nor was summoned in Crawford County, but the complaint was one quasi in rem to determine the rights to the money in the registry of the Crawford County Circuit Court and, specifically, his rights to attorney fees, Crawford County was the proper venue for hearing the complaint in intervention under § 16-22-304(e). *Milligan v. Circuit Court*, 331 Ark. 439, 959 S.W.2d 747 (1998).

—Contracts.

Action on contract relating to personal property may be brought in any county in which defendant resides or is summoned. *Kastor v. Elliott*, 77 Ark. 148, 91 S.W. 8 (1905).

When a complaint asserts both local and transitory causes of action the venue is determined by the real character of the action, by its principal purpose or object; thus, plaintiff's complaint found to assert a transitory cause of action; therefore, venue could not be fixed in the county of the plaintiff's property since defendants resided elsewhere. *Atkins Pickle Co. v. Burrough-Uerling-Brasuell Consulting Eng'rs, Inc.*, 275 Ark. 135, 628 S.W.2d 9 (1982).

In action brought in tort and contract, action properly brought in a county in which at least one of the defendants was a resident because allegation of damage and prayer for relief showed that the real action was on the contract. *Frank A. Rogers & Co. v. Whitmore*, 275 Ark. 324, 629 S.W.2d 293 (1982).

An action for damages resulting from a breach of contract cannot be brought in a county when the only connection with that county is the residence of the plaintiff. *Beatty v. Ponder*, 278 Ark. 41, 642 S.W.2d 891 (1982); *Shelter Mut. Ins. Co. v. Taylor*, 281 Ark. 60, 661 S.W.2d 369 (1983).

—Defamation.

Venue in a defamation suit or for a claim for tortious interference is proper in a county where one of the defendants resides or is summoned. *Belin v. West*, 315 Ark. 61, 864 S.W.2d 838 (1993).

—Insurance.

Special statute relating to insurance companies and not this section applied to

suits against sureties on bond of fire insurance companies. *Neimeyer v. Claiborne*, 87 Ark. 72, 112 S.W. 387 (1908).

Where neither the insurer nor its agent was summoned in county of policyholder's residence nor did either of them reside therein, action to reform insurance policy was improperly brought in the county and writ of prohibition would be granted to prevent county chancery court from proceeding in the case. *Shelter Mut. Ins. Co. v. Taylor*, 281 Ark. 60, 661 S.W.2d 369 (1983).

Action for reformation of policy coverage was an action on contract and, thus, venue was governed by this section which grants venue to any county in which a defendant, or one of several defendants, resides, or is summoned. *Shelter Mut. Ins. Co. v. Taylor*, 281 Ark. 60, 661 S.W.2d 369 (1983).

In cause of action by insured alleging bad faith refusal by insurer to settle claim, venue might be established either pursuant to § 16-60-103, governing actions against corporations, or pursuant to this section; insurance company was not entitled to writ prohibiting such action on ground of improper venue, even though original action to recover on policy had been brought in different county, since the original action, for all practical purposes, was no longer pending. *Farm Bureau Mut. Ins. Co. v. Southall*, 281 Ark. 141, 661 S.W.2d 383 (1983), *aff'd* on other grounds, 238 Ark. 335, 676 S.W.2d 228 (1984).

—Notes.

Suit on a note against makers and endorser was held properly filed in county of endorser's residence. *Gibson v. Talley*, 206 Ark. 1, 174 S.W.2d 551 (1943).

The maker and endorser of a note can be sued in the same action and the plea of venue is not good in the action unless there is a fraudulent or fictitious joinder or unless the resident defendant is dismissed before judgment. *Gibson v. Talley*, 206 Ark. 1, 174 S.W.2d 551 (1943).

Other Laws.

Section 16-60-112(a) repeals subsection (a) insofar as it relates to personal injuries. *Fort Smith Gas Co. v. Kincannon*, 202 Ark. 216, 150 S.W.2d 968 (1941).

Section 16-60-113 is not inconsistent with and it does not repeal this section.

Commercial Union Fire Ins. Co. v. Hansen, 205 Ark. 612, 170 S.W.2d 1012 (1943) (decision prior to 1947 amendment of § 16-60-113).

Procedure.

This section has no application to actions for discovery. *Morgan Utils., Inc. v. Perry County*, 183 Ark. 542, 37 S.W.2d 74 (1931).

Although there could be no judgment against codefendant who resided in another county, over his objection, unless there was a judgment against resident codefendant, it was improper to instruct jury that there could be no finding for plaintiff unless they found that both codefendants were negligent. *Howe v. Hatley*, 186 Ark. 366, 54 S.W.2d 64 (1932).

Venue is a procedural matter, not a jurisdictional one. *Prairie Implement Co. v. Circuit Court*, 311 Ark. 200, 844 S.W.2d 299 (1992).

—General Appearance.

A general appearance will subject the defendant to the court's jurisdiction even though the suit is filed in the wrong venue. *Murdock Acceptance Corp. v. Speer*, 225 Ark. 948, 286 S.W.2d 485 (1956).

In suit against corporation brought in county other than where defendant corporation had its place of business and residence and other than where the corporation was served, filing of an answer by the defendant corporation constituted a general appearance by which it waived the question of venue and the corporation was not thereafter entitled to have the complaint dismissed for lack of venue. *Murdock Acceptance Corp. v. Speer*, 225 Ark. 948, 286 S.W.2d 485 (1956).

—Objection.

Where the defendant corporation went to trial on the merits after an objection to venue was overruled, and in the trial obtained an adverse decision, it was permitted on appeal to raise the question of jurisdiction of the person. *Spratley v. Louisiana & A. Ry.*, 77 Ark. 412, 95 S.W. 776 (1906).

A defendant summoned in a county not of his residence, who appears and makes no objection to the proceeding against him before judgment, waives his right to do so. *Barnes v. Balz*, 173 Ark. 417, 292 S.W. 391 (1927).

One sued under this section in another county than that of his residence cannot come into court asserting a claim, and asking affirmative relief, and then when there is an adverse judgment, claim that the court had no jurisdiction over his person. *Federal Land Bank v. Gladish*, 176 Ark. 267, 2 S.W.2d 696 (1928).

A nonresident defendant jointly charged with a resident in an action of tort may not object to the venue until his codefendant has been held not liable. *Howe v. Hatley*, 186 Ark. 366, 54 S.W.2d 64 (1932).

A defendant sued upon a transitory cause of action in a county other than that in which he resides or is served with process may object to the service at any time before judgment is rendered against him even though he filed answer and cross complaint. *Sloan v. Peoples Loan & Inv. Co.*, 195 Ark. 1085, 115 S.W.2d 833 (1938).

Where before judgment defendant objected to any judgment that might be rendered against him unless there was a judgment rendered against one or more of his codefendants, reversal of judgment against codefendants requires reversal of judgment against him, with leave to appellee to bring another action against such defendant where service may be had on him. *Arkansas-Louisiana Gas Co. v. Tuggle*, 201 Ark. 416, 146 S.W.2d 154 (1940).

A decree entered against all the defendants was not objectionable because the evidence did not disclose the joint liability of all the defendants. *Ferguson v. Huddleston*, 208 Ark. 353, 186 S.W.2d 152 (1945).

Nonresident defendant could not object to judgment taken against him following dismissal of case against resident defendant, if he did not raise objection until after judgment was entered against him. *Stevens v. Gilliam*, 220 Ark. 867, 251 S.W.2d 241 (1952).

A general appearance will subject the defendant to the court's jurisdiction, even though the suit is in the wrong county. *Coley v. Green*, 232 Ark. 289, 335 S.W.2d 720 (1960).

When the defendant is summoned to appear in an action outside his own county and his answer does not raise the question of venue, he is deemed to have waived it. *Coley v. Green*, 232 Ark. 289, 335 S.W.2d 720 (1960).

Resident Defendant.

On application for certiorari to quash judgment for want of service, finding of circuit court that defendant was resident of county at commencement of action is conclusive. *Fowler v. McKennon*, 45 Ark. 94 (1885).

The issue whether a defendant residing in the county had a personal interest in the suit and was therefore properly a party is, when the evidence is conflicting, a question for the jury. *Southwestern Veneer Co. v. Dennison*, 174 Ark. 560, 298 S.W. 30 (1927).

In an action for negligence in the sale of a beverage where no negligence of resident defendants is shown, the verdict should have been directed in favor of a defendant served in another county than that in which the action was brought. *Coca-Cola Bottling Co. v. Swilling*, 186 Ark. 1149, 57 S.W.2d 1029 (1933).

Service of Summons.

A resident of the state, while attending the taking of depositions in a cause to which he is a party in a county not of his residence, is privileged from service of summons in another action pending there. *Powers v. Arkadelphia Lumber Co.*, 61 Ark. 504, 33 S.W. 842 (1896).

Plaintiff not properly served and having objected to the court's assumption of jurisdiction in apt time, judgment against him would be reversed and dismissed. *Seelbinder v. Witherspoon*, 124 Ark. 331, 187 S.W. 325 (1916).

An attorney, while attending court in his professional capacity in a county other than that of his residence, is not exempt from the service of summons in a civil action brought against him in that county. *Paul v. Stuckey*, 126 Ark. 389, 189 S.W. 676 (1916).

The rules of public policy require that the summons must be served in the county where the defendant voluntarily goes, and not where he is called in the high concern of public duty. *Doyle-Kidd Dry Goods Co. v. Munn*, 151 Ark. 629, 238 S.W. 40 (1922).

This section permits a defendant to be sued, not only in the county of his residence, but also in another county in which he is found provided he is served with process in the usual and ordinary course of circumstances, but not where service was had collusively. *Hot Springs St. Ry. v.*

Henry, 186 Ark. 1094, 57 S.W.2d 1050 (1933).

Although § 16-61-111(b) relates to the parties who may be joined in an action, it does not relate to venue which must still be obtained by proper service under venue statutes. *Barr v. Cockrill*, 224 Ark. 570, 275 S.W.2d 6 (1955).

Several Defendants.

Where resident of one county, served with summons therein, was brought to trial in another county because codefendants were found and served in that county, but before judgment he objected to any judgment that might be rendered against him unless there was a judgment rendered against one or more of his codefendants, reversal of judgment against codefendants requires reversal of judgment against him, with leave to plaintiff to bring another action against the defendant where service may be had on him. *Arkansas-Louisiana Gas Co. v. Tuggle*, 201 Ark. 416, 146 S.W.2d 154 (1940).

Under this section resident defendant must be a bona fide defendant and no judgment can be had against the nonresident where the resident defendant was exonerated by the verdict, if timely objection is made. *Commercial Union Fire Ins. Co. v. Hansen*, 205 Ark. 612, 170 S.W.2d 1012 (1943).

Each defendant is liable to suit only in the county wherein he resides or wherein it maintains an office, and defendant cannot be dragged from the forum of his residence or place of business except where a suit is against several defendants, in which case action may be brought in any county in which the defendant or one of the several defendants resides or is summoned. *Universal C.I.T. Credit Corp. v. Troutt*, 235 Ark. 38, 357 S.W.2d 507 (1962).

Where Arkansas corporation brought contract action against two individual residents of another state and an individual resident of a county in Arkansas, venue could not be properly laid in county of corporation's principal place of business, if none of the defendants were served with process in that county. *Ozark Supply Co. v. Glass*, 261 Ark. 750, 552 S.W.2d 1 (1977).

Where venue is appropriate for one defendant, it will only lie for a co-defendant when the co-defendant is jointly liable

with the resident defendant. *Junction City Sch. Dist. v. Alphin*, 313 Ark. 456, 855 S.W.2d 316 (1993).

For purposes of determining proper venue under subsection (a), multiple defendants may be held jointly liable under different theories of liability, such as negligent conduct and intentional tortious conduct. *Boatmen's Nat'l Bank v. Cole*, 329 Ark. 209, 947 S.W.2d 362 (1997).

—Jurisdiction of Nonresidents.

Service of summons upon all of the defendants may be made in other counties than that in which the action is brought, if at its commencement any of them resided in the county where it was brought. *Fowler v. McKennon*, 45 Ark. 94 (1885); *Rowell v. Godfrey*, 57 Ark. 257, 21 S.W. 437 (1893); *Sallee v. Bank of Corning*, 122 Ark. 502, 184 S.W. 44 (1916); *Commercial Union Fire Ins. Co. v. Hansen*, 205 Ark. 612, 170 S.W.2d 1012 (1943).

In order to obtain judgment on service upon a defendant in a county other than that in which a suit is brought, service must be obtained in the county where the suit is brought on a codefendant jointly liable with nonresident defendant, and it should appear from face of complaint that plaintiff was entitled to recover judgment against both defendants. *Hoyt v. Ross*, 144 Ark. 473, 222 S.W. 705 (1920).

Where action was brought against defendants, of which one was located in the county in which suit was brought, the court of the county had jurisdiction over defendant which was served at its domicile in another county. *Red Bud Realty Co. v. South*, 153 Ark. 380, 241 S.W. 21 (1922).

A defendant, served in a county in which he does not reside, upon dismissal of the action against his codefendants, is entitled to a dismissal, and does not, by virtue of an appeal from a judgment erroneously entered, enter his appearance so as to render further service unnecessary for a new trial. *Fidelity Mut. Life Ins. Co. v. Price*, 180 Ark. 214, 20 S.W.2d 874 (1929).

Where none of defendants were residents of county in which suit was brought, fact that two of codefendants who were citizens of another state entered appearance in suit did not prevent defendant residing in another county in Arkansas from insisting on his right to be sued in the county of his residence. *Metzger v. Mann*, 183 Ark. 40, 34 S.W.2d 1069 (1931).

Action against joint tortfeasors may be brought in county in which one of them resides. *Wilson v. Lucas*, 185 Ark. 183, 47 S.W.2d 8 (1932); *Commercial Credit Co. v. Ragland*, 189 Ark. 349, 72 S.W.2d 226 (1934); *Meeks v. Waggoner*, 191 Ark. 189, 85 S.W.2d 711 (1935).

Where defendant, not a resident of county of suit, is collusively served in that county, jurisdiction is not thereby obtained over a codefendant who is a nonresident of the county. *Hot Springs St. Ry. v. Henry*, 186 Ark. 1094, 57 S.W.2d 1050 (1933).

Under this section if a local defendant is sued in a transitory action and proper service had, the court can obtain jurisdiction over defendants in other counties, be they natural or artificial, by having proper process on them. *Harger v. Oklahoma Gas & Elec. Co.*, 195 Ark. 107, 111 S.W.2d 485 (1937), cert. denied, 304 U.S. 569, 58 S.Ct. 1038, 82 L. Ed. 1534 (1938).

The maker and endorser of a note can be sued in the same action and the plea of venue is not good in the action unless there is a fraudulent or fictitious joinder or unless the resident defendant is dismissed before judgment. *Gibson v. Talley*, 206 Ark. 1, 174 S.W.2d 551 (1943).

A court of the county where some of the defendants reside has no jurisdiction over nonresidents of the county served in their counties in a transitory action by the receiver of a reciprocal insurance company to recover separate judgments for assessments under separate contracts since the defendants are admittedly severally but not jointly liable. *Barr v. Cockrill*, 224 Ark. 570, 275 S.W.2d 6 (1955).

Where the venue in this case rested entirely upon the service on the insurance company in the county of the deceased's death, and the case as to the insurance company was dismissed, upon the dismissal of the insurer upon whom venue was predicated, there remained but one thing for its former codefendant to do and that was to move for a dismissal of the action against it, which was done, and the case should have been dismissed, the credit corporation having no office in that county. *Universal C.I.T. Credit Corp. v. Troutt*, 235 Ark. 38, 357 S.W.2d 507 (1962).

—Nonresident Liability.

A judgment cannot be rendered against a defendant jointly sued with others who

neither resided in the county in which suit was brought, nor was summoned therein, if he objected before judgment to the proceeding or unless judgment is rendered against a codefendant who was summoned in that county or who resided therein at the commencement of the action. *Stiewel v. Borman*, 63 Ark. 30, 37 S.W. 404 (1896); *Universal C.I.T. Credit Corp. v. Troutt*, 235 Ark. 38, 357 S.W.2d 507 (1962).

Where suit does not result in judgment against resident defendant, judgment against nonresident codefendant could not be obtained. *Seelbinder v. Witherspoon*, 124 Ark. 331, 187 S.W. 325 (1916); *Murrell v. Exchange Bank*, 168 Ark. 645, 271 S.W. 21 (1925); *Commercial Union Fire Ins. Co. v. Hansen*, 205 Ark. 612, 170 S.W.2d 1012 (1943); *Terry v. Plunkett-Jarrell Grocery Co.*, 220 Ark. 3, 246 S.W.2d 415 (1952); *Nevil C. Withrow Co. v. Heber Springs School Dist.*, 229 Ark. 939, 320 S.W.2d 95 (1959).

A defendant served in a county in which he does not reside is, upon dismissal of the action as to his codefendant, entitled to a dismissal; he does not, by appealing from a judgment entered against him, enter his appearance so as to render further service unnecessary for a new trial. *Fidelity Mut. Life Ins. Co. v. Price*, 180 Ark. 214, 20 S.W.2d 874 (1929).

Service cannot be had in a transitory action on a defendant in a county other than that of his residence except where there is service in the county where the action is instituted on a codefendant who is jointly liable. *Metzger v. Mann*, 183 Ark. 40, 34 S.W.2d 1069 (1931).

Where after rendition of verdict foreign corporation was the only defendant before a county circuit court, corporation stood as if it had been sued alone, provisions of this statute applied, and service of summons on agent designated to receive service in another county did not confer jurisdiction over corporation on the county circuit court. *Bryant Truck Lines v. Nance*, 199 Ark. 556, 134 S.W.2d 555 (1939).

Service against nonresident defendant is not valid unless a judgment can be secured against resident defendant on joint liability. *Terry v. Plunkett-Jarrell Grocery Co.*, 220 Ark. 3, 246 S.W.2d 415 (1952).

When a defendant is summoned to appear in an action outside his own county

and the action is dismissed against codefendants, resident of the county in which the action is pending, then, upon proper objection, no judgment can be rendered against the defendant nonresident of the county. *Coley v. Green*, 232 Ark. 289, 335 S.W.2d 720 (1960).

When a cause of action is barred by statute of limitations against only defendant served with summons in county in which action is brought, judgment against other defendants not served in the county cannot stand. *Central Invs., Inc. v. Polk*, 239 Ark. 165, 388 S.W.2d 381 (1965).

Where Arkansas corporation brought contract action against individual residents of another state and an individual resident of Arkansas, venue could not be properly laid in county where corporation had its principal place of business, if none of the defendants were served with process in that county. *Ozark Supply Co. v. Glass*, 261 Ark. 750, 552 S.W.2d 1 (1977).

Subrogation.

Section 23-89-101 is a subrogation statute, and the action permitted by it is contractual in nature and not for personal injury; thus, venue is determined not by § 16-60-112 but by this section or § 23-79-204. *Equity Fire & Cas. Ins. Co. v. Coleman*, 326 Ark. 100, 928 S.W.2d 796 (1996).

Waiver.

A claim of improper venue may be waived if the party objecting to venue seeks affirmative relief in the action with respect to which the venue objection has been made. *Steve Standridge Ins., Inc. v. Langston*, 321 Ark. 331, 900 S.W.2d 955 (1995).

Neither the failure to press the state court venue issue in federal court nor the request for affirmative relief there caused a waiver of the venue issue in Circuit Court proceedings. *Steve Standridge Ins., Inc. v. Langston*, 321 Ark. 331, 900 S.W.2d 955 (1995).

Writ of Prohibition.

The State Supreme Court will grant a writ of prohibition when, on undisputed facts, a trial court erroneously finds that venue is proper. *Prairie Implement Co. v. Circuit Court*, 311 Ark. 200, 844 S.W.2d 299 (1992).

The State Supreme Court would not decide either of petitioner's arguments for

a writ of prohibition based on lack of venue where the arguments had not been raised below. *Prairie Implement Co. v. Circuit Court*, 311 Ark. 200, 844 S.W.2d 299 (1992).

A writ of prohibition will not be issued as long as resolution of the venue (jurisdiction) issue rests on one of two possible kinds of factual determinations: first, the evidence presented by both parties is in direct conflict; or, second the evidentiary facts are not in direct conflict, however, there is a dispute over whether the established facts "fit" a certain legal definition. *Steve Standridge Ins., Inc. v. Langston*, 321 Ark. 331, 900 S.W.2d 955 (1995).

Cited: *Fidelity Mtg. Co. v. Evans*, 168 Ark. 459, 270 S.W. 624 (1925); *St. Louis-San Francisco Ry. v. McDonald*, 175 Ark. 630, 299 S.W. 999 (1927); *Mayner v. Utah Constr. Co.*, 108 F. Supp. 532 (W.D. Ark. 1952); *Murdock Acceptance Corp. v. Speer*, 225 Ark. 948, 286 S.W.2d 485 (1956); *Hicks v. Wolfe*, 228 Ark. 406, 307 S.W.2d

784 (1957); *Horn v. Horn*, 232 Ark. 723, 339 S.W.2d 852 (1960); *Gallman v. Carnes*, 254 Ark. 987, 497 S.W.2d 47 (1973); *Cavette v. Ford Motor Credit Co.*, 260 Ark. 874, 545 S.W.2d 612 (1977); *American Sav. & Loan Ass'n v. Enfield*, 261 Ark. 796, 551 S.W.2d 552 (1977); *Ray Ross Constr. Co. v. Raney*, 266 Ark. 606, 587 S.W.2d 46 (1979); *Heber Springs Lawn & Garden, Inc. v. FMC Corp.*, 275 Ark. 260, 628 S.W.2d 563 (1982); *Wasp Oil, Inc. v. Arkansas Oil & Gas, Inc.*, 280 Ark. 420, 658 S.W.2d 397 (1983); *Porter Foods, Inc. v. Brown*, 281 Ark. 148, 661 S.W.2d 388 (1983); *Firstsouth v. Yates*, 286 Ark. 82, 689 S.W.2d 532 (1985); *Zolper v. AT & T Info. Sys.*, 289 Ark. 27, 709 S.W.2d 74 (1986); *Benton Window & Door, Little Rock Div., Inc. v. Garrett*, 290 Ark. 244, 718 S.W.2d 438 (1986); *Superior Mktg. Research Corp. v. Purifoy*, 296 Ark. 156, 752 S.W.2d 277 (1988); *Two Bros. Farm v. Riceland Foods, Inc.*, 57 Ark. App. 25, 940 S.W.2d 889 (1997).

16-60-117. Actions local in nature — Service anywhere in state.

In any action which may lawfully be brought only in some one (1) or more particular counties in this state and not in any county of the state in which service may be had on the defendant, so that the venue for the action is local and not transitory in nature, summons may be served upon the defendant or defendants in the action in any county in this state.

History. Acts 1941, No. 21, § 1; A.S.A. 1947, § 27-618.

CASE NOTES

ANALYSIS

Building moving.
Damage to crops.
Separate districts of county.

Building Moving.

An action for injury to realty is local in nature and must be brought in the county in which the land is situated and a building being moved is still realty where there is no intention to convert it into personal property, so that claim for damage to it in moving is properly venued in the county where the building was when moved. *Bucton Constr. Co. v. Carlson*, 225 Ark. 208, 280 S.W.2d 408 (1955).

Damage to Crops.

In suit by plaintiffs to recover damage to crop as result of dusting of nearby crop by defendant filed in county where land of plaintiffs was located, service on defendant in another county was proper, since damage to crop was local in nature. *Heeb v. Prysock*, 219 Ark. 899, 245 S.W.2d 577 (1952).

Separate Districts of County.

The separate districts of a county must be treated as separate counties and where action was properly brought in the northern district under the provisions of § 16-60-112(a), it was proper to serve defendant in southern district in which

defendant resided. *Smith v. Waggoner*, F. Supp. 532 (W.D. Ark. 1952); *Peel v. 212 Ark. 345*, 205 S.W.2d 465 (1947). *Kelley*, 268 Ark. 90, 594 S.W.2d 11 (1980).

Cited: *Mayner v. Utah Constr. Co.*, 108

16-60-118. Civil actions in Pulaski County.

(a) For any civil action filed in circuit court in Pulaski County pursuant to a law that declares Pulaski County to be the venue for all such actions in the state, the action may be heard by a judge of another judicial district who agrees to hear such actions pursuant to this section.

(b) A judge may agree to hear the actions by notifying the Administrative Office of the Courts on a form provided by the office.

(c)(1) The assignment of a judge from another judicial district shall be made pursuant to procedures prescribed by the Administrative Office of the Courts unless the Arkansas Supreme Court adopts rules for the assignment of judges.

(2) The rules shall provide for the random selection of the participating judges.

(d) If an action is assigned to a judge of another judicial district, the judge may hear the action in a court in Pulaski County or in the judicial district of the judge.

History. Acts 1997, No. 725, § 1.

SUBCHAPTER 2 — CHANGE OF VENUE

SECTION.

16-60-201. Motion — Notice.

16-60-202. No change made unless found necessary.

16-60-203. Objection to petition — Order.

16-60-204. Procedure when order granted

SECTION.

— Transmission of papers

— Fees.

16-60-205. Number of changes limited.

16-60-206. Time for trial after change.

16-60-207. Domestic relations.

Cross References. Disqualification of judges, Ark. Const., Art. 7, § 20.

Justices of the peace, § 16-19-406.

Effective Dates. Acts 1875, No. 38, § 7: effective on passage.

Acts 1909, No. 192, § 2: effective on passage.

Acts 1909, No. 249, § 2: effective on passage.

RESEARCH REFERENCES

ALR. Change of venue justified by fact that large number of inhabitants of local jurisdiction have interest adverse to party to action. 10 ALR 4th 1046.

Venue change in action for malicious prosecution. 12 ALR 4th 1278.

Am. Jur. 18 Am. Jur. 2d, Contrib., § 39 et seq.

77 Am. Jur. 2d, Venue, § 50 et seq.

C.J.S. 92A C.J.S., Venue, § 145 et seq.

CASE NOTES

Applicability.

The sections set forth in this subchapter govern all proceedings for change in venue

in civil cases. *Arkansas State Hwy. Comm'n v. Heirs of Ring*, 247 Ark. 170, 444 S.W.2d 705 (1969).

16-60-201. Motion — Notice.

(a)(1) Any party to a civil action to be tried by a jury may obtain an order for a change of venue therein by motion upon a petition stating that he or she verily believes that he or she cannot obtain a fair and impartial trial in the action in the county in which the action is pending, on account of the undue influence of his or her adversary, or of the undue prejudice against the petitioner or his cause of action or defense, in the county.

(2) The petition shall be signed by the party and verified as pleadings are required to be verified and shall be supported by the affidavits of at least two (2) credible persons to the effect that the affiants believe the statements of the petition are true.

(3) When a corporation files the petition, the petition shall be supported by the affidavits of two (2) credible persons, neither of whom is directly or indirectly connected with the corporation in any capacity whatever, and neither of whom has been promised, nor shall receive, within twelve (12) months next preceding the signing of the petition, any benefit or favor from the corporation different from those received by every other citizen of the state or which every citizen is entitled to receive as a matter of right.

(b) The motion shall be made before, and the order granted by, the judge of the circuit court of the county in which the action is pending in open court or in vacation. If the motion is made at any time or place except in open court, at the calling of the case, it shall be upon reasonable notice in writing to the adverse party or his or her attorney.

(c) The party may make his or her petition and the affidavit supporting the petition apply to one (1) county in addition to the one in which the action is pending.

History. Acts 1875, No. 38, §§ 1, 2, p. 114; 1909, No. 192, § 1, p. 570; C. & M. Dig., §§ 10339, 10340; Pope's Dig., §§ 14340, 14341; A.S.A. 1947, §§ 27-701, 27-702.

CASE NOTES

ANALYSIS

Abuse of discretion.
Appeal.
Joinder.

Place of transfer.
Support of petition.

Abuse of Discretion.

The action of the trial court in refusing

to grant a change of venue will not be disturbed on appeal unless a clear abuse of discretion is shown. *Van Camp v. State*, 125 Ark. 532, 189 S.W. 173 (1916).

A trial court has the discretion to refuse a petition for a change of venue where the plaintiff alleges that he could not obtain a fair and impartial trial in the county, but does not allege any fact upon which his opinion was based. *Pierce v. Sicard*, 176 Ark. 511, 3 S.W.2d 337 (1928).

Denial of a change of venue in suit was not an abuse of discretion, though two-thirds of the county were interested. *Desha v. Independence County Bridge Dist. No. 1*, 176 Ark. 253, 3 S.W.2d 969 (1928).

Fact that absence of affidavit in support of motion was not objected to at trial did not prevent Supreme Court from considering such absence in determining whether trial court abused its discretion in denying motion. *Arkansas State Hwy. Comm'n v. Leavell*, 246 Ark. 1049, 441 S.W.2d 99 (1969).

Refusal to grant motion for change of venue based on other than statutory grounds was not an abuse of discretion of trial court. *Arkansas State Hwy. Comm'n v. Heirs of Ring*, 247 Ark. 170, 444 S.W.2d 705 (1969).

Although defendant filed a verified motion for a change of venue, where motion was not supported by additional affidavits as required by this section there was not an abuse of discretion when the trial court refused the motion, even though other party failed to object to the sufficiency of the motion. *Arkansas State Hwy. Comm'n v. Geeslin*, 247 Ark. 537, 446 S.W.2d 245 (1969).

Appeal.

A case on appeal may be changed by

complying with this section. *Hurley v. Bevens*, 57 Ark. 547, 22 S.W. 172 (1893).

Joinder.

All defendants must join in asking for a change of venue. *Klein v. German Nat'l Bank*, 69 Ark. 140, 61 S.W. 572 (1901).

Place of Transfer.

Venue of civil action may be changed to county outside the circuit. *Palatina Ins. Co. v. Evans*, 63 Ark. 241, 37 S.W. 1046 (1896).

Support of Petition.

On an application for a change of venue, in order for an affiant to qualify as a credible person, he must be cognizant of the prejudice existing throughout the entire county and it is not sufficient for him to show a knowledge of the popular sentiment in three or four localities of the county. *Hedden v. State*, 179 Ark. 1079, 20 S.W.2d 119 (1929).

No matter how credible one affiant may be, a petition for change of venue supported by the affidavit of only one person is properly overruled for noncompliance with this section requiring the affidavit of two credible persons. *Arkansas State Hwy. Comm'n v. Duff*, 246 Ark. 922, 440 S.W.2d 563 (1969).

The requirements of this section that a motion for change of venue be supported by two affidavits cannot be waived. *Arkansas State Hwy. Comm'n v. Leavell*, 246 Ark. 1049, 441 S.W.2d 99 (1969).

Where State Highway Commission failed to follow the mandatory procedure set out in this section in petitioning for change of venue in eminent domain case, motion for change of venue was properly denied. *Arkansas State Hwy. Comm'n v. Coffman*, 247 Ark. 302, 445 S.W.2d 92 (1969).

16-60-202. No change made unless found necessary.

The venue of civil actions shall not be changed unless the court or judge to whom the application for change of venue is made finds that the change of venue is necessary to obtain a fair and impartial trial of the cause.

History. Acts 1909, No. 249, § 1, p. 751; C. & M. Dig., § 10341; Pope's Dig., § 14342; A.S.A. 1947, § 27-704.

CASE NOTES

ANALYSIS

Abuse of discretion.
 Paternity.

Abuse of Discretion.

The granting or denial of a change of venue lies largely in the discretion of a trial judge, and the Supreme Court will not reverse the trial court's denial of a change of venue unless there has been an abuse of its discretion. *Arkansas State Hwy. Comm'n v. Duff*, 246 Ark. 922, 440 S.W.2d 563 (1969).

Refusal to grant motion for change of venue based on other than statutory grounds was not an abuse of discretion of trial court. *Arkansas State Hwy. Comm'n v. Heirs of Ring*, 247 Ark. 170, 444 S.W.2d 705 (1969).

Paternity.

Change of venue in paternity suit falls under this section. *Scott v. State*, 173 Ark. 625, 292 S.W. 979 (1927).

Cited: *Arkansas State Hwy. Comm'n v. Heirs of Ring*, 247 Ark. 170, 444 S.W.2d 705 (1969).

16-60-203. Objection to petition — Order.

Upon presenting the petition, which may be resisted, and upon notice to the judge, the judge may make an order for the change of venue in the action, if in his or her judgment it is necessary for a fair and impartial trial, to a county to which there is no valid objection and which he or she concludes is most convenient to the parties and their witnesses.

History. Acts 1875, No. 38, § 3, p. 114; 1899, No. 116, § 1, p. 189; A.S.A. 1947, § 27-703.

CASE NOTES

Discretion of Court.

Exercise of discretion of trial court will not be interfered with. *Louisiana & N.W.*

Ry. v. Smith, 74 Ark. 172, 85 S.W. 242 (1905).

16-60-204. Procedure when order granted — Transmission of papers — Fees.

(a) When the order for change of venue is obtained out of term time, the party obtaining the order shall cause the petition, notice, affidavit, and order to be delivered to the clerk of the court in which the action is pending, who shall file the order with the papers in the case.

(b)(1) In all cases where an order for a change of venue is granted, the clerk shall make and file with the papers a certified copy of all the orders in the case and, upon the payment of the transmission fees provided for in this section, shall transmit the papers in the case to the clerk of the court to which the venue is changed by any safe and convenient mode which he or she may select.

(2) The clerk shall be responsible for the transmission of the papers, for which he or she shall receive ten cents (10¢) per mile to and from the clerk's office, to be paid by the party obtaining the order, and to be taxed in the costs.

(c)(1) If the above-mentioned fee is not paid or arranged with the clerk within fifteen (15) days from the granting of the order, the order shall be null and void.

(2) The judge granting the order may extend the time of making such payment, which shall be stated in the order.

(3) The adverse party, if he or she chooses, may make such payment.

History. Acts 1875, No. 38, §§ 4, 5, p. 114; C. & M. Dig., §§ 10342, 10343; Pope's Dig., §§ 14343, 14344; A.S.A. 1947, §§ 27-705, 27-706.

CASE NOTES

ANALYSIS

Order.
Prepayment.
Presumption.

Order.

An order varying from the petition as to the grounds for the change of venue is amendable. *Hurley v. Bevens*, 57 Ark. 547, 22 S.W. 172 (1893).

Prepayment.

A court to which the venue is changed acquires jurisdiction upon the filing of the

transcript when the clerk waived the prepayment of his fees. *Fritz Bros. v. Wells*, 83 Ark. 124, 103 S.W. 168 (1907).

Presumption.

On appeal, where the record shows that an order for a change of venue was made and that thereafter the parties voluntarily submitted to trial in the court in which the action was brought, it will be presumed the order became inoperative under this section. *Duncan v. Tufts*, 52 Ark. 404, 12 S.W. 873 (1889).

16-60-205. Number of changes limited.

Only one (1) order for a change of venue shall be granted to the same party in the same action.

History. Acts 1875, No. 38, § 5, p. 114; C. & M. Dig., § 10343; Pope's Dig., § 14344; A.S.A. 1947, § 27-706.

16-60-206. Time for trial after change.

In all cases of change of venue, the action shall stand for trial in the court to which the change is made at the first term of the court which commences more than ten (10) days from the filing of the papers of the case in the office of the clerk of such court.

History. Acts 1875, No. 38, § 6, p. 114; C. & M. Dig., § 10344; Pope's Dig., § 14345; A.S.A. 1947, § 27-707.

16-60-207. Domestic relations.

The venue of domestic relations cases in this state may be transferred between judicial districts in which either party resides, when agreed to by the parties to the action and the judges involved.

History. Acts 1975, No. 371, § 1; A.S.A. 1947, § 27-708; Acts 2003, No. 1185, § 191.

Amendments. The 2003 amendment

substituted “judicial districts” for “chancery circuits” and “judges” for “chancellors of the circuits.”

CHAPTER 61

PARTIES

SUBCHAPTER

1. GENERAL PROVISIONS.
2. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 16-61-101. Designation of parties.
- 16-61-102. Married persons.
- 16-61-103. Actions by infants.
- 16-61-104. Actions against infants — Defense by guardian.
- 16-61-105. Actions by insane persons.
- 16-61-106. Actions against insane persons — Defense.
- 16-61-107. Insanity during pendency of action — Guardian joined.
- 16-61-108. Guardian ad litem — Appointment — Party or attorney not appointed for infant or insane person.

SECTION.

- 16-61-109. Fees of guardian or attorney appointed to defend infant, insane person, or prisoner — Costs.
- 16-61-110. Foreign executors, administrators, and guardians.
- 16-61-111. Joint and several obligors.
- 16-61-112. Assignments.
- 16-61-113. Interpleader generally.
- 16-61-114. Interpleader by defendant.
- 16-61-115. Interpleader in action against sheriff for recovery of property or proceeds.

Publisher's Notes. Some provisions of this subchapter may be superseded by the Arkansas Rules of Civil Procedure pursuant to the Supersession Rule adopted by the Supreme Court of Arkansas in its order of December 18, 1978.

Cross References. Parties to actions, ARCP 17.

Effective Dates. Acts 1871, No. 48, § 1 [890]: effective 90 days after passage.

Acts 1875 (Adj. Sess.), No. 32, § 2: effective on passage.

RESEARCH REFERENCES

ALR. Standing of civic or property owners' association to challenge zoning board decision (as aggrieved party). 8 ALR 4th 1087.

Descendability or inheritability of right to contest will. 11 ALR 4th 907.

Standing of foster parent to seek termination of rights of foster child's natural parents. 21 ALR 4th 535.

Right of insurer to intervene in action by insured against uninsured motorist. 35 ALR 4th 757.

Right of insurer to intervene in workers' compensation proceeding. 38 ALR 4th 355.

Assignability of claim for legal malpractice. 40 ALR 4th 684.

No-fault insurer as defendant where insured automobile owner or operator is not liable for economic losses under no-fault insurance law. 40 ALR 4th 858.

Am. Jur. 59 Am. Jur. 2d, Parties, § 1 et seq.

16-61-101. Designation of parties.

In a civil action, the party complaining shall be known as the plaintiff and the adverse party as the defendant.

History. Civil Code, § 2; C. & M. Dig., § 1032; Pope's Dig., § 1234; A.S.A. 1947, § 27-203.

CASE NOTES

Cited: *Coleman v. Coleman*, 257 Ark. 404, 520 S.W.2d 239 (1975).

16-61-102. Married persons.

(a) If a husband and wife are sued together, the wife may defend:

(1) For her own right; and

(2) If the husband neglects to defend, for his right also.

(b) Where a husband, being a father, has deserted his family, the wife, being a mother, may prosecute or defend in his name any action which he might have prosecuted or defended and shall have the same powers and rights therein as he might have had.

History. Civil Code, §§ 43, 44; C. & M. Dig., §§ 1108, 1109; Pope's Dig., §§ 1324, 1325; A.S.A. 1947, §§ 27-821, 27-822.

CASE NOTES

ANALYSIS

Recovery of land.

Removal.

Torts.

Witnesses.

Recovery of Land.

Wife could sue for recovery of land in name of absent husband where evidence showed that husband abandoned wife and children. *Edge v. Buschow Lumber Co.*, 218 Ark. 903, 239 S.W.2d 597 (1951).

Removal.

The right of a married woman to sue for personal injuries in her own name is not lost by the defendant's removal of the cause of action to a federal court. *Texas & Pac. Ry. v. Humble*, 181 U.S. 57, 21 S. Ct. 526, 45 L. Ed. 747 (1901).

Torts.

The husband is responsible for the wife's torts committed during coverture. Such torts may be committed under the

following circumstances: (1) where the husband is absent and had no knowledge of the intended act; (2) where the husband is absent but the tort is done under his direction; (3) where the husband was present, but the wife acted on her own volition; and (4) where the tort is committed in the company of the husband and by his command or encouragement. In the first three cases they are jointly liable and the wife must be joined as she is in reality the offending party. In the last situation the husband alone is the offending party. *Kosminsky v. Goldberg*, 44 Ark. 401 (1884).

Witnesses.

In an action by a husband and wife to recover damages for personal injuries to each of them, although neither is a competent witness for or against the other, either is competent to testify in his or her own behalf. *Saint Louis, I.M. & S. Ry. v. Amos*, 54 Ark. 159, 15 S.W. 362 (1891).

16-61-103. Actions by infants.

(a) The action of an infant must be brought by his or her guardian or his or her next friend.

(b) Any person may bring the action of an infant as his or her next friend, but the court has power to dismiss it if it is not for the benefit of the infant, or to substitute the guardian of the infant, or another person, as the next friend.

(c) The guardian or next friend is liable for the costs of the action brought by him or her, and where he or she is insolvent and it is made to appear that the action is malicious or that the next friend was selected because of his or her insolvency, the court in its discretion may require him or her to give security for the costs.

History. Civil Code, §§ 46, 47; C. & M. Dig. §§ 1111, 1112; Pope's Dig., §§ 1327, 1328; A.S.A. 1947, §§ 27-823, 27-824.

CASE NOTES**ANALYSIS**

Action of infant.

Appeals.

Discretion of court.

Guardian or next friend.

—Parents.

Majority.

Waiver.

Action of Infant.

The action of an infant must be brought by his guardian or next friend but it is nevertheless the action of the infant no matter by whom it is brought. *Hare v. Shaw*, 84 Ark. 32, 104 S.W. 931 (1907); *Buckley v. Collins*, 119 Ark. 231, 177 S.W. 920 (1915).

Filing of amended complaint in justice court by a minor's next friend where account previously filed was in name of the next friend as guardian for the minor did not constitute it a suit by a different party, since in either case it is a suit of the minor. *Buckley v. Collins*, 119 Ark. 231, 177 S.W. 920 (1915).

A judgment in a suit by an infant in his own name is not void, but subject to reversal. *Davie v. Padgett*, 117 Ark. 544, 176 S.W. 333 (1915).

Where the only impediment to suit by a minor was one of capacity, and where the interests of the minor were sufficiently protected, the court could enter judgment in favor of the minor child. *Cowden v. Ramsay*, 154 Bankr. 531 (Bankr. E.D. Ark. 1993).

Appeals.

One who prosecutes an action at law as next friend of an infant plaintiff becomes liable for the costs of the appeal if a judgment in the infant's favor is reversed. *Arkansas & L. Ry. v. Luck*, 86 Ark. 564, 111 S.W. 1126 (1908).

Discretion of Court.

The court may revoke the authority of a next friend and appoint another. *Nashville Lumber Co. v. Barefield*, 93 Ark. 353, 124 S.W. 758 (1910).

An infant may sue by his next friend whether he has a guardian or not but the court, in its discretion, may determine whether or not the cause shall proceed as commenced. *Truman Cooperage Co. v. Shelton*, 136 Ark. 570, 207 S.W. 42 (1918).

Guardian or Next Friend.

Where a suit is brought by an infant by her foreign guardian, it was not error to permit her to substitute a resident as her next friend. *Saint Louis, I.M. & S. Ry. v. Haist*, 71 Ark. 258, 72 S.W. 893 (1903), overruled on other grounds, *Malone & Hyde, Inc. v. Chisley*, 308 Ark. 308, 825 S.W.2d 558 (1992).

A minor, by his next friend, may sue his guardian to surcharge his accounts as guardian. *Parker v. Wilson*, 98 Ark. 553, 136 S.W. 981 (1911).

In an action by an infant husband brought by his guardian and parent to annul a marriage with another infant, a

judgment cannot be rendered against the guardian and parent for alimony. *Erwin v. Erwin*, 120 Ark. 581, 180 S.W. 186 (1915).

A natural guardian cannot sue in his own name for an infant. *Irby v. Dowdy*, 139 Ark. 299, 213 S.W. 739 (1919).

A suit to annul the marriage of an infant was properly brought by his mother as his natural guardian and next friend. *Kibler v. Kibler*, 180 Ark. 1152, 24 S.W.2d 867 (1930).

—Parents.

Parents are the owners of clothing, toys, and athletic equipment given by them to their minor children and may recover therefor in a negligence action in their own names without joinder of the minor children through guardian or next friend. *Cy Carney Appliance Co. v. True*, 226 Ark. 961, 295 S.W.2d 768 (1956).

Action by father as next friend of minor child to set aside deed by which the father conveyed one-half interest in land to the minor child was properly dismissed by the court as not being for the benefit of the infant. *Robertson v. Robertson*, 227 Ark. 978, 302 S.W.2d 810 (1957).

A father bringing suit as next friend of his minor son who was injured in an automobile wreck in which the driver was killed was not a disqualified witness under the dead man's statute, because he was not the real party to the suit, he being liable only for the costs if the infant lost the action and thus little more than a surety on the bond for costs. *Dieter v.*

Byrd, 235 Ark. 435, 360 S.W.2d 495 (1962).

The action of a minor whose father was in military service for personal injuries against a decedent's estate could have been brought by her mother or any adult as next friend and the statute of nonclaim was not tolled as to the action because of the absence of the father in military service. *Lopez v. Waldrum Estate*, 249 Ark. 558, 460 S.W.2d 61 (1970).

Majority.

That minor plaintiff suing by next friend reached the age of majority before trial was held not to abate the action; she was simply empowered to proceed alone from that date. *Coca-Cola Bottling Co. v. Davidson*, 193 Ark. 825, 102 S.W.2d 833 (1937).

If wife attains the age of majority prior to trial of action for divorce, decree of divorce is valid, though she sued for divorce in her own name prior to attaining age of majority. *Obennoskey v. Obennoskey*, 215 Ark. 358, 220 S.W.2d 610 (1949).

Waiver.

Where infant wife filed suit for divorce in her own name, husband defendant waived defense of minority of wife, by pleading to the merits. *Obennoskey v. Obennoskey*, 215 Ark. 358, 220 S.W.2d 610 (1949).

Cited: *Wilder v. Wilder*, 207 Ark. 414, 181 S.W.2d 17 (1944).

16-61-104. Actions against infants — Defense by guardian.

(a) The defense of an infant must be by his or her regular guardian or by a guardian appointed to defend for him or her, where no regular guardian appears, or where the court directs a defense by a guardian appointed for that purpose.

(b) No judgment can be rendered against an infant until after a defense by a guardian.

(c)(1) The appointment of a guardian may be made upon the application of the infant if he or she is of the age of fourteen (14) years and if he or she applies within twenty (20) days after the service of the summons.

(2) If he or she is under the age of fourteen (14) years or does not so apply, the appointment may be made upon the application of any friend of the infant or on that of the plaintiff in the action.

History. Civil Code, §§ 48, 50; Acts 1871, No. 48, § 1 [50], p. 219; C. & M. Dig., §§ 1113, 1115; Pope's Dig., §§ 1329, 1331; A.S.A. 1947, §§ 27-825, 27-827.

CASE NOTES

ANALYSIS

Appointment.
Attorney ad litem.
Judgment.
Procedure.
Waiver.

Appointment.

Where minors are involved, it is error to decree a foreclosure of property in which they are interested without a bona fide defense by the regular guardian, curator, or by a guardian ad litem and without proof of the allegations of the complaint, but a decree so rendered is not void but voidable. *Boyd v. Roane*, 49 Ark. 397, 5 S.W. 704 (1887); *Arkansas Trust Co. v. Sims*, 198 Ark. 1143, 133 S.W.2d 854 (1939).

An appearance by a regular guardian is sufficient, without having a guardian ad litem appointed. *Nunn v. Robertson*, 80 Ark. 350, 97 S.W. 293 (1906).

Where, during trial, minor defendants moved for a directed verdict because a guardian had not been appointed for them, they were not entitled to a directed verdict but a mistrial should have been ordered. *Smith v. Thomason*, 229 Ark. 889, 318 S.W.2d 814 (1958).

Where decedent's heirs sought to cancel rental and purchase option contract executed between decedent and defendant, entry of judgment against minor heir on defendant's cross complaint was improper as minor came into suit by his mother as next friend and statute required that infant's defense be made by a guardian. *Robinson v. Cline*, 255 Ark. 571, 501 S.W.2d 244 (1973).

In proceedings on petition for adoption the probate court erred in denying minor mother's petition to annul an interlocutory decree of adoption, where the minor mother, who had executed a consent to adoption, and an entry of appearance in the adoption proceeding while in the office of the adopting parents' attorney, was not served with process prior to the entry of the interlocutory order, and where the decree was rendered without a defense by a guardian ad litem. *Schrum v. Bolding*,

260 Ark. 114, 539 S.W.2d 415 (1976) (decision under prior law).

Attorney Ad Litem.

An attorney ad litem should not be appointed for an infant. *Hodges v. Frazier*, 31 Ark. 58 (1876); *Williams v. Ewing & Fanning*, 31 Ark. 229 (1876).

Judgment.

It is error to render judgment by default against infant. *Morris v. Edmonds*, 43 Ark. 427 (1884); *Woodall v. Delatour*, 43 Ark. 521 (1884); *State ex rel. Luck v. Atkins*, 53 Ark. 303, 13 S.W. 1097 (1890).

It is error to render judgment on a cross complaint against minor defendants before they answer. *Sexton v. Crebbins*, 80 Ark. 519, 98 S.W. 116 (1906); *Williamson v. Grider*, 97 Ark. 588, 135 S.W. 361 (1911); *Ryan v. Fielder*, 99 Ark. 374, 138 S.W. 973 (1911); *Blanton v. Davis*, 107 Ark. 1, 154 S.W. 947 (1913).

Judgment rendered in a case defended by a foreign guardian is not void. *Martin v. Gwynn*, 90 Ark. 44, 117 S.W. 754 (1909).

Judgment against an infant rendered without the appointment of a guardian to defend him is voidable. *Sauve v. Ingram*, 200 Ark. 1181, 143 S.W.2d 541 (1940).

Procedure.

Defense of a minor's legal rights should not be perfunctory and formal, but real and earnest; guardian or curator should put in issue, and require proof of, every material allegation prejudicial to infant, he is not required to verify answer and can make no concessions on his own knowledge, and he must put and keep the plaintiff at arm's length. *Moore v. Woodall*, 40 Ark. 42 (1882); *Freeman v. Russell*, 40 Ark. 56 (1882); *Pinchback v. Graves*, 42 Ark. 222 (1883); *Arkansas Trust Co. v. Sims*, 198 Ark. 1143, 133 S.W.2d 854 (1939).

Representation should be a full defense, specifically denying the material allegations of the complaint, without regard to the truth of the denials as to anything which may be prejudicial to the minor. *Varnier v. Rice*, 44 Ark. 236 (1884).

An infant is not prejudiced by admis-

sions of his guardian or attorney. *McLoy v. Arnett*, 47 Ark. 445, 2 S.W. 71 (1886).

Where the pleadings were made up before the death of the defendant, it is not necessary for the guardian of the minor heirs to file an additional answer. *Vandiever v. Conditt*, 110 Ark. 311, 162 S.W. 47 (1913).

This section does not require the guardian to preserve the evidence in a record. *Price v. Hartzell*, 135 Ark. 440, 205 S.W. 829 (1918).

Defense of a minor's legal rights should not be perfunctory and formal, but real and earnest; guardian or curator should put in issue, and require proof of, every material allegation prejudicial to infant, he is not required to verify answer and can make no concessions on his own knowledge, and he must put and keep the

plaintiff at arm's length. *Moore v. Woodall*, 40 Ark. 42 (1882); *Freeman v. Russell*, 40 Ark. 56 (1882); *Pinchback v. Graves*, 42 Ark. 222 (1883); *Arkansas Trust Co. v. Sims*, 198 Ark. 1143, 133 S.W.2d 854 (1939).

Waiver.

Contention that minors were not properly in court by guardian ad litem but were represented by next friend, not raised in apt time by demurrer, is waived. *Cannon v. Price*, 202 Ark. 464, 150 S.W.2d 755 (1941).

Cited: *Ingram v. Raiford*, 174 Ark. 1127, 298 S.W. 507 (1927); *Freeman v. Russell*, 40 Ark. 56 (1882); *Pinchback v. Graves*, 42 Ark. 222 (1883); *Arkansas Trust Co. v. Sims*, 198 Ark. 1143, 133 S.W.2d 854 (1939).

16-61-105. Actions by insane persons.

(a)(1) The action of a person judicially found to be of unsound mind must be brought by his or her guardian or, if he or she has none, by his or her next friend.

(2) When brought by his or her next friend, the action is subject to the powers of the court in the same manner as the action of an infant so brought.

(b) The guardian or next friend is liable for the costs, and the court, in its discretion, may require him or her to give security for costs.

History. Civil Code, §§ 51, 52; C. & M. Dig., §§ 1116, 1117; Pope's Dig., §§ 1332, 1333; A.S.A. 1947, §§ 27-828, 27-829.

CASE NOTES

ANALYSIS

Purpose.
Allegation of incompetency.
Irregular appointment.
Next friend.
Real party in interest.

Purpose.

This section is intended to protect all persons of unsound mind whether judicially declared to be such or not. *Peters v. Townsend*, 93 Ark. 103, 124 S.W. 255 (1910).

Allegation of Incompetency.

If a court had jurisdiction to determine a veteran's prior action for liability benefits under a war risk policy and no sugges-

tion was made in that action that the veteran was incompetent, a judgment dismissing the action could not be attacked on the ground that the veteran was incompetent when the judgment was rendered. *McCoy v. United States*, 54 F. Supp. 960 (W.D. Ark. 1944).

Irregular Appointment.

Where, in an action by a person judicially found to be insane, the appointment of a guardian is void, the court may permit the action to be prosecuted by a next friend. *Scott v. Stephenson*, 168 Ark. 763, 271 S.W. 714 (1925).

Though appointment of guardian for an insane person was irregular, jurisdiction of the circuit court to entertain action by

guardian on behalf of the ward would not be affected. *Missouri State Life Ins. Co. v. Holt*, 186 Ark. 672, 55 S.W.2d 788 (1932).

Next Friend.

The court may discharge the next friend and appoint another. *Hare v. Shaw*, 84 Ark. 32, 104 S.W. 931 (1907).

A creditor of a bankrupt, non compos mentis but not actually insane person, having no guardian or committee, could file and prosecute a claim against the bankrupt's estate by his next friend. In re *Kronberg*, 208 F. 203 (E.D. Ark. 1913).

Wife, though a nonresident, had the right to go into the same court in which a decree of divorce had been granted against her and attempt to show, after the lapse of the term, that a fraud had been practiced upon the court in procuring the

decree, and, where wife was insane, her nephew, though also a nonresident, could act for her in bringing suit as next friend. *Wilder v. Wilder*, 207 Ark. 414, 181 S.W.2d 17 (1944).

Suit by daughter as next friend of her mother to cancel deed held proper where deed was executed by mother after she sustained a severe stroke. *Banks v. Howell*, 220 Ark. 439, 248 S.W.2d 95 (1952).

Real Party in Interest.

Wife, though insane, is the real and proper party in suit to set aside divorce decree granted against her and person suing as next friend is neither technically nor substantially the real party to the action. *Wilder v. Wilder*, 207 Ark. 414, 181 S.W.2d 17 (1944).

16-61-106. Actions against insane persons — Defense.

(a) The defense of an action against a person judicially found to be of unsound mind must be by his or her guardian or a guardian appointed by the court to defend for him, where no guardian appears or where the court directs a defense by a guardian.

(b) No judgment can be rendered against him or her until after a defense by his or her guardian or by a guardian appointed for that purpose.

(c) No appointment can be made until after service of the summons, as directed in this code.

(d) The guardian to defend may be appointed on the application of any friend of the defendant or on that of the plaintiff.

History. Civil Code, §§ 53, 54; C. & M. Dig., §§ 1118, 1119; Pope's Dig., §§ 1334, 1335; A.S.A. 1947, §§ 27-830, 27-831.

Publisher's Notes. The code referred

to in this section means the Code of Practice in Civil Cases of 1869. See parallel reference tables in the tables volume.

CASE NOTES

ANALYSIS

Condemnation.
Divorce.
Guardian.
Judgment.
Mortgage foreclosure.
Personal service.

Condemnation.

It is error to proceed with the trial of a condemnation suit when a party of unsound mind is a party thereto, and is not represented by a statutory guardian ad litem, but the proceeding is not void but

merely voidable. *Hare v. Ft. Smith & W.R.R.*, 104 Ark. 187, 148 S.W. 1038 (1912).

Divorce.

A divorce for incurable insanity granted to a spouse who is guardian for the insane requires service on the superintendent or physician in charge of the institution where the insane is confined and on a guardian ad litem; lack of representation by guardian ad litem and service thereon renders the divorce voidable and subject to direct attack on the ground of unavoidable casualty even after the death of the

spouse to whom the divorce was granted, his or her personal representative and attorney being proper parties defendant in the action to vacate the divorce decree. *Jackson v. Bowman*, 226 Ark. 753, 294 S.W.2d 344 (1956).

Guardian.

Where authority of supposed guardian was rejected by judge at chambers, the defendant stood as though he had never been represented in the cause by him. *Cox v. Gress*, 51 Ark. 224, 11 S.W. 416 (1888).

Judgment.

Where a judgment is rendered by a court having jurisdiction of the parties and subject matter it will not be void because the defendant was insane and no defense was made for her by a guardian. *McDonald v. Fort Smith & W.R.R.*, 105 Ark. 5, 150 S.W. 135 (1912).

Mortgage Foreclosure.

In a mortgage foreclosure an adjudicated mentally incompetent mortgagor who has no guardian may be served with process at the institution where he is confined, and where the superintendent of the hospital also is served the court has jurisdiction to grant the foreclosure. *Croswell v. Linder*, 226 Ark. 853, 294 S.W.2d 493 (1956).

Personal Service.

Personal service upon an incompetent is a prerequisite to appointment of a guardian ad litem for the incompetent. *Myers v. Snider*, 226 Ark. 849, 294 S.W.2d 495 (1956).

Cited: *White ex rel. Peoples v. Garrison*, 271 Ark. App. 487, 609 S.W.2d 111 (1980); *Zardin v. Terry*, 275 Ark. 452, 631 S.W.2d 285 (1982).

16-61-107. Insanity during pendency of action — Guardian joined.

Where a party is judicially found to be of unsound mind during the pendency of an action, the fact being stated on the record:

(1) If he or she is the plaintiff, his or her guardian may be joined with him or her in the action as such;

(2) If he or she is the defendant, the plaintiff may, upon ten (10) days' notice thereof to his or her guardian, have an order making the guardian a defendant also.

History. Civil Code, § 55; C. & M. Dig., § 1120; Pope's Dig., § 1336; A.S.A. 1947, § 27-832.

16-61-108. Guardian ad litem — Appointment — Party or attorney not appointed for infant or insane person.

(a) The guardian to defend shall be appointed by the circuit court or by the judge thereof.

(b) The appointment cannot be made until after the service of the summons in the action.

(c) No party or attorney in an action can be appointed guardian to defend therein for an infant or person of unsound mind.

(d)(1) During the vacation of the court, the circuit court clerk shall have the same power of appointing a guardian ad litem for an infant defendant who has been summoned in the action that his or her court or the judge thereof has.

(2) The court or judge shall have the power to change the guardian so appointed by appointing another in his or her stead whenever the interests of the infant require such a change.

(e) The clerk shall endorse the name of the guardian and the date of his or her appointment upon the complaint.

History. Civil Code, § 49; C. & M. Dig., § 1114; Pope's Dig., § 1330; A.S.A. 1947, § 27-826.

CASE NOTES

ANALYSIS

Allegation of incompetency.

Appointment necessary.

Foreclosure.

Infant heirs.

Service of summons.

Allegation of Incompetency.

Where attorney for defendant filed a motion to vacate the decree on the ground that it was procured by fraud, the motion was properly overruled by the court where it did not allege that defendant was mentally incompetent at the time of the trial and no continuance was asked on the ground of mental incompetence of the defendant. *Dixie Cab Co. v. Black & White Cab Co.*, 214 Ark. 624, 217 S.W.2d 602 (1949).

Appointment Necessary.

Since section requires appointment of guardian ad litem, parties cannot object to such appointment as unnecessary. *Sibeck v. McTiernan*, 94 Ark. 1, 125 S.W. 136 (1910).

Where an infant has no statutory guardian, in an action against the infant, proof cannot be taken in the action prior to the appointment either by the court or the clerk in vacation, of a guardian ad litem. *Blanton v. Davis*, 107 Ark. 1, 154 S.W. 947 (1913).

It is error to render a judgment against an infant defendant without the appointment of a guardian and defense made, and the appointment must be made before proof is taken in the case so that the guardian may have the opportunity of attending when proof is taken. *Dudley v. Dudley*, 126 Ark. 182, 189 S.W. 838 (1916).

Foreclosure.

In suit to compel purchaser at foreclosure sale to comply with his bid and accept deed to property, answer asking dismissal of suit on ground that decree of foreclosure was void because minor defendants had

never been served with summons and no guardian ad litem was ever appointed to represent them, was held a direct attack which could be made after expiration of term in which foreclosure decree was entered since chancellor retained control of the proceedings. *Fisher v. Wilkerson*, 199 Ark. 31, 132 S.W.2d 827 (1939).

Infant Heirs.

Where the number and names of infant heirs are unknown, a guardian ad litem cannot be appointed for them. *Kountz v. Davis*, 34 Ark. 590 (1879).

Service of Summons.

No decree can be rendered against an infant until he is served with a summons or by a warning order, and an answer by guardian denying all the material allegations of the complaint have been filed, and a guardian ad litem cannot be appointed for him until after such service. *Freeman v. Russell*, 40 Ark. 56 (1882).

Where the record in an action against an infant failed to show that the infant was served with process, the judgment will be reversed, though a guardian was appointed and denied every material allegation in the complaint. *Moore v. Wilson*, 180 Ark. 41, 20 S.W.2d 310 (1929).

A divorce for incurable insanity granted to a spouse who is guardian for the insane requires service on the superintendent or physician in charge of the institution where the insane is confined and on a guardian ad litem; lack of representation by guardian ad litem and service thereon renders the divorce voidable and subject to direct attack on the ground of unavoidable casualty even after the death of the spouse to whom the divorce was granted, his or her personal representative and attorney being proper parties defendant in the action to vacate the divorce decree. *Jackson v. Bowman*, 226 Ark. 753, 294 S.W.2d 344 (1956).

Under this section, trial court appointment of attorney for both defendants as

attorney ad litem for the absent defendant, alleged to be of unsound mind, was reversible error. *Garver v. Utyesonich*, 235 Ark. 33, 356 S.W.2d 744 (1962).

In proceeding on petition for adoption the probate court erred in denying minor mother's petition to annul an interlocutory decree of adoption, where the minor mother, who had executed a consent to

adoption and an entry of appearance in the adoption proceeding while in the office of the adopting parents' attorney, was not served with process prior to the entry of the interlocutory order, and where the decree was rendered without a defense by a guardian ad litem. *Schrum v. Bolding*, 260 Ark. 114, 539 S.W.2d 415 (1976) (decision under prior law).

16-61-109. Fees of guardian or attorney appointed to defend infant, insane person, or prisoner — Costs.

A guardian or attorney appointed on the application of the plaintiff to defend for an infant, person of unsound mind, or prisoner shall be allowed a reasonable fee for his or her services, to be paid by the plaintiff and taxed in the costs.

History. Civil Code, § 57; C. & M. Dig., § 1122; Pope's Dig., § 1338; A.S.A. 1947, § 27-834.

CASE NOTES

Cited: *Middleton v. Lockhart*, 344 Ark. 572, 43 S.W.3d 113 (2001).

16-61-110. Foreign executors, administrators, and guardians.

Administrators, executors, and guardians appointed in any of the states, territories, or districts of the United States, under the laws thereof, may sue in any of the courts of this state, in their representative capacity, to the same and like effect as if the administrators, executors, and guardians had been qualified under the laws of this state. However, the administrators, executors, or guardians shall be required, before they shall institute a suit or proceeding, to execute the same bond as is required of other nonresidents by the laws of this state.

History. Acts 1843, § 1, p. 105; C. & M. Dig., § 1093; Pope's Dig., § 1309; A.S.A. 1947, § 27-805.

CASE NOTES

ANALYSIS

Applicability.
Ancillary letters.
Jurisdiction.
Substitution.

Applicability.

A foreign administratrix may sue in this state. *Saint Louis, I.M. & S. Ry. v. Cleere*, 76 Ark. 377, 88 S.W. 995 (1905).

This section does not mention curators. *Kindrick v. Capps*, 196 Ark. 1169, 121 S.W.2d 515 (1938).

Ancillary Letters.

A foreign administrator had recovered a judgment in an action brought by him in his representative capacity in the jurisdiction of his appointment. It was held that he may sue upon the judgment in his own name without taking out ancillary letters.

McCraw v. Simpson, 208 Ark. 471, 187 S.W.2d 536 (1945).

Jurisdiction.

A domiciliary administratrix of a deceased's out-of-state estate voluntarily entered her appearance in an interpleader proceeding in Arkansas claiming a fund involved in an action in a federal court in the other state. It was held that the Arkansas chancery court had jurisdiction. *McCraw v. Simpson*, 208 Ark. 471, 187 S.W.2d 536 (1945).

Substitution.

An administrator appointed at the deceased's domicile in another state cannot

sue for a debt due his intestate in this state after the appointment of an administrator here. *Gibson v. Ponder*, 40 Ark. 195 (1882).

Where a suit is brought by an infant by her foreign guardian, it was not error to permit her to substitute a resident as her next friend. *Saint Louis, I.M. & S. Ry. v. Haist*, 71 Ark. 258, 72 S.W. 893 (1903), overruled on other grounds, *Malone & Hyde, Inc. v. Chisley*, 308 Ark. 308, 825 S.W.2d 558 (1992).

Cited: *Tipler v. Crafton*, 202 Ark. 351, 150 S.W.2d 625 (1941); *Redditt v. Hale*, 184 F.2d 443 (8th Cir. 1950).

16-61-111. Joint and several obligors.

(a) Joint obligations shall be construed to have the same effect as joint and several obligations, and may be sued on, and recoveries had thereon in like manner.

(b) Persons severally liable upon the same contract, including parties to bills of exchange, promissory notes placed upon the footing of bills of exchange, common orders and checks, and sureties on the same or separate instruments, may all, or any of them, or the representatives of those persons who may have died, be included in the same action, at the plaintiff's option.

(c)(1) Where two (2) or more persons are jointly bound by contract, the action thereon may be brought against all or any of them, at the plaintiff's option.

(2) Where any of the persons so bound are dead, the action may be brought against any or all of the survivors, with the representatives of all or any of the decedents, or against the latter, or any of them.

(3) Where all the persons so bound are dead, the action may be brought against the representatives of all or of any of them.

(4) An action or judgment against any one (1) or more of several persons jointly bound shall not be a bar to proceedings against the other.

(d) No creditor on any joint, or joint and several, obligation shall have more than one (1) satisfaction and costs in one (1) suit.

History. Rev. Stat., ch. 82, §§ 3, 5; §§ 1282, 1284, 1315, 1316; A.S.A. 1947, Civil Code, §§ 34, 35; C. & M. Dig., §§ 27-810 — 27-813. §§ 1099, 1100, 6229, 6231; Pope's Dig.,

RESEARCH REFERENCES

Ark. L. Notes. Matthews, *Procedural Considerations in Bringing Suit Against a*

General Partnership in Arkansas, 1989 Ark. L. Notes 57.

CASE NOTES

ANALYSIS

Costs.
Effect.
Liability.
Survival.

Costs.

Where separate suits are brought against two parties liable on a joint contract and judgment for costs recovered against one of them which is satisfied, the costs of the other suit should be charged against the plaintiff; but where there has been no satisfaction of the first judgment, the plaintiff should have judgment for costs against the other promisor. *Kissire v. Plunkett-Jarrell Grocer Co.*, 103 Ark. 473, 145 S.W. 567 (1912).

Effect.

Where a bill is signed by a firm and by firm members individually, one is liable for the full amount of the note although no service is had upon the other. *Lamew v. Wilson-Ward Co.*, 106 Ark. 340, 153 S.W. 261 (1913).

Fact that judgment was had against principal only on retaining bond did not prevent a subsequent judgment from being rendered against the surety. *Craig v. Collier*, 155 Ark. 538, 244 S.W. 717 (1922).

The owners of less than the entire reversion could sue to enforce the forfeiture of an oil and gas lease for breach of an implied covenant to develop since in this state the covenants of the lessee are divisible in that each assignee must develop his portion. *Alphin v. Gulf Ref. Co.*, 39 F. Supp. 570 (W.D. Ark. 1941).

Accommodation maker is not entitled to judgment against comakers in suit on note by payee against all makers until he has paid judgment obtained by payee. *Haley v. Brewer*, 220 Ark. 511, 248 S.W.2d 890 (1952).

Where defendant signed certain promissory notes both as officer of corporation and in his own name, he could not show by parol evidence that he was not to be bound by such notes. *Larcon Co. v. Wallingsford*, 136 F. Supp. 602 (W.D. Ark. 1955).

Liability.

In a suit on a joint and several contract, the plaintiff may sue all or any of the co-contractors. *Deloach v. Dixon*, 7 F. Cas.

416 (C.C.D. Ark. 1840) (No. 3,775); *Johnson v. Byrd*, 13 F. Cas. 735 (C.C.D. Ark. 1841) (No. 7,376).

Payee of a note may sue one or more of the payors at his election. *Bradford, Rainwater & Co. v. Toney*, 30 Ark. 763 (1875).

The surviving maker of a promissory note, who is the administrator of his deceased coobligor, may be sued on the note in both his individual and representative capacity, at the same time. *W.J. Little Grocer Co. v. Johnson*, 50 Ark. 62, 6 S.W. 231 (1887).

Survival.

Joint obligations are taken as joint and several, and survive. *Maledon v. Leflore*, 62 Ark. 387, 35 S.W. 1102 (1896).

Where statute provided that officer depositing public funds should be liable therefor together with the sureties on his official bond and the bank and its stockholders a recovery could be had against all of them or against any of them. *Warren v. Nix*, 97 Ark. 374, 135 S.W. 896 (1911).

Where person purchased certain goods from plaintiff and the defendants agreed to pay whatever balance shown to be due to the plaintiff, it was held that the plaintiff, could sue both the person and the defendants in the same action. *Fluhart v. W.T. Rawleigh Co.*, 126 Ark. 307, 190 S.W. 118 (1916).

Both the drawer and acceptor of a draft are severally liable to the payee, and he may pursue both either jointly or severally, though only one satisfaction may be had. *Ohio Galvanizing & Mfg. Co. v. Nichol*, 170 Ark. 16, 279 S.W. 377 (1926).

Where suit is brought against contractors and sureties on a construction bond, the fact that case was dismissed as to sureties for want of jurisdiction did not require dismissal as to contractors, who were liable in any event where they bought material and failed to pay for it. *Hot Springs Concrete Co. v. Rosamond*, 178 Ark. 194, 10 S.W.2d 12 (1928).

In a joint action against an insolvent county depository and its nonresident surety, there was no separable controversy entitling the surety to a removal. *Consolidated Indem. & Ins. Co. v. State ex rel. Craighead County*, 184 Ark. 581, 43 S.W.2d 240 (1931).

It was not improper to join insolvent

bank and its surety in suit on depository bond. Consolidated Indem. & Ins. Co. v. State ex rel. Craighead County, 184 Ark. 581, 43 S.W.2d 240 (1931).

A defendant cannot bring in another party defendant unless he files a cross complaint against the party and states facts showing that the cause of action against the third party affects the subject of the original action. Meyers Store Co. v. Armstrong, 187 Ark. 636, 61 S.W.2d 440 (1933).

In a lessee's suit for breach of lease in which the evidence was conflicting as to whether one lessor authorized a material alteration of the lease, purporting to be the agent of all the lessors, an instruction that the lessors were not liable unless all the lessors authorized the alteration was erroneous. Darling Shops, Inc. v. Brack, 95 F.2d 135 (8th Cir. 1938).

Note executed by partnership is the joint obligation of the partners and holder had the right to sue either the surviving partner or the administratrix of the estate of the deceased partner or both. Nakdimen v. Bruton, 196 Ark. 1179, 112 S.W.2d 974 (1938).

Surviving partner sued as maker of partnership note had the right, by appropriate pleadings, to have the comaker, or his administratrix, made a party defendant, but he could not compel the plaintiff to sue the other party or to have process issued bringing the administratrix into the suit. Nakdimen v. Bruton, 196 Ark. 1179, 112 S.W.2d 974 (1938).

Accommodation maker is not entitled to judgment against comakers in suit on note by payee against all makers until he has paid judgment obtained by payee. Haley v. Brewer, 220 Ark. 511, 248 S.W.2d 890 (1952).

Subsection (b) relates to the parties which may be joined in an action and does not relate to venue which must still be obtained by proper service under venue statutes. Barr v. Cockrill, 224 Ark. 570, 275 S.W.2d 6 (1955).

Where defendant signed certain promissory notes both as officer of corporation and in his own name, he could not show by parol evidence that he was not to be bound by the notes. Larcon Co. v. Wallingsford, 136 F. Supp. 602 (W.D. Ark. 1955), aff'd, 237 F.2d 904 (8th Cir. 1956).

16-61-112. Assignments.

(a) When the assignment is not authorized by statute, the assignor must be a party as plaintiff or defendant.

(b) Where the right of the plaintiff is transferred or assigned during the pendency of the action, it may be continued in his or her name, or the court may allow the person to whom the transfer or assignment is made to be substituted in the action, proper orders being made as to security for the costs.

History. Civil Code, §§ 26, 27; Acts 1873, No. 88, § 1 [26], p. 213; C. & M. Dig., §§ 1090, 1091; Pope's Dig., §§ 1306, 1307; A.S.A. 1947, §§ 27-802, 27-803.

CASE NOTES

ANALYSIS

In general.
Administrative actions.
Bills of lading.
Bonds.
Control of action.
Insurance.
Judgments.
Negotiable instruments.
Nonnegotiable bill.
Open account.

Out-of-state laws.
Pendency of action.
Statute of limitations.
Sureties.
Tort claims.

In General.

It is only when the assignment of a thing in action is not authorized by statute that the assignor is required to be made a party. Collier v. Trice, 79 Ark. 414, 96 S.W. 174 (1906).

Administrative Actions.

While assignor would have been a necessary party in a suit for damages in circuit court, the assignee's action involved a complaint before the Real Estate Commission, which is governed by the rules of the Arkansas Administrative Procedures Act. *Eckels v. Arkansas Real Estate Comm'n*, 30 Ark. App. 69, 783 S.W.2d 864 (1990).

Bills of Lading.

While bills of lading with the words "nonnegotiable" printed across their face are not negotiable in the sense of the law merchant, they represent the property shipped; when assigned and delivered with intent to pass the title to the property, it is not necessary for the assignee, in a suit based upon them, to join his assignor as plaintiff. *Dewberry-Harget Co. v. Arkansas State Bank*, 164 Ark. 223, 261 S.W. 301 (1924).

In an action by carrier against the shipper of goods under a through bill of lading to recover freight charges, refusal to grant the shipper's request to make the initial carrier a party in order that he might offset a claim for damages against the amount plaintiff paid the initial carrier for freight charges was not error, where, though the bill of lading was assignable, it was not assigned to plaintiff. *Price v. New York, C. & St. L. Ry.*, 175 Ark. 688, 300 S.W. 373 (1927).

Bonds.

Assignee of claim growing out of breach of supersedeas bond may sue in his own name. *Love v. Cahn*, 93 Ark. 215, 124 S.W. 259 (1909).

Control of Action.

The assignee has the right to control the action. *Boqua v. Marshall*, 88 Ark. 373, 114 S.W. 714 (1908).

Insurance.

Insured in automobile damage policy was necessary party to suit against person causing damage, brought by insurer which alleged its subrogation to insured's rights by assignment. *American Fid. Fire Ins. Co. v. Stewart*, 165 F. Supp. 34 (W.D. Ark. 1958); *Motors Ins. Corp. v. Coker*, 218 Ark. 653, 238 S.W.2d 491 (1951).

Judgments.

The assignee of a judgment is entitled to defend an appeal therefrom by the other

party, as against the claim to the right by the assignor's administratrix. *Mutual Benefit Health & Accident Ass'n v. Hunnicutt*, 181 Ark. 694, 27 S.W.2d 93 (1930).

Negotiable Instruments.

Real owner of note may sue in his own name though he holds by delivery merely. *Webster v. Carter*, 99 Ark. 458, 138 S.W. 1006 (1911).

Where a bank made collections for another bank and sent drafts therefor which were not paid because the collecting bank went into the hands of the state bank commissioner, the other bank may maintain an action against the bank commissioner to have its claim allowed as a preferred claim. *Rainwater v. Federal Reserve Bank*, 172 Ark. 631, 290 S.W. 69 (1927).

Where person had become assignee of a note sued on, he was the real party in interest and on motion should have been substituted as sole plaintiff. *Higginbotham v. Ritter*, 200 Ark. 376, 139 S.W.2d 27 (1940).

Nonnegotiable Bill.

Where person assigned nonnegotiable bill to plaintiff, without endorsement, it was held that the plaintiff could maintain an action against the maker of the bill without making the assignor a party plaintiff. *Morgan v. Center*, 133 Ark. 247, 202 S.W. 235 (1918).

Open Account.

An open account is not assignable, and a party to whom it is transferred cannot sue upon it alone, but must join his assignor as a party. *Goode v. Aetna Cas. & Sur. Co.*, 178 Ark. 451, 13 S.W.2d 6 (1928).

Out-of-State Laws.

The assignment of claims against a corporation for the purpose of collection merely, if valid in the state where made, will entitle the assignee to bring an action thereon in his own name in this state. *Lanigan v. North*, 69 Ark. 62, 63 S.W. 62 (1901).

Pendency of Action.

Fact that plaintiff's title and interest in note sued on has been transferred since commencement of action is no defense at law to the action. *Ivey v. Drake*, 36 Ark. 228 (1880).

Where the right of a party to suit to

share in fund in litigation defended upon verbal contract, the assignment of his interest to another authorized the latter to control the litigation. *Boqua v. Marshall*, 88 Ark. 373, 114 S.W. 714 (1908).

Where right of plaintiff in action is transferred during the pendency of the action, the assignee is not a necessary party and suit may be continued in name of assignor. *Thibue v. Broadbush*, 106 Ark. 418, 153 S.W. 611 (1913).

Advancement by the manager to an abstract company of the price of making an abstract of title for the defendant constituted an assignment of the company's right of action to the manager and the action may be continued in the name of the company. *Benson v. Arkansas Abstract Co.*, 123 Ark. 620, 185 S.W. 1089 (1916).

Where plaintiffs in a suit to quiet their title to certain lands sold the lands, it is proper to make their grantees parties plaintiff. *Hurst v. Munson*, 152 Ark. 313, 238 S.W. 42 (1922).

The assignee of county warrants issued for the construction of a bridge may appeal from an order of the county court cancelling the warrants and refusing to reissue the same. *Woodruff County v. Road Imp. Dist. No. 14*, 159 Ark. 374, 252 S.W. 930 (1923).

Assignment by defendant contractor of

his contract to surety company during pendency of action entitles plaintiffs to proceed against assignees. *Southern Sur. Co. v. Phillips*, 181 Ark. 14, 24 S.W.2d 870 (1930).

An assignment can be made during the pendency of an action on a note. *Higginbotham v. Ritter*, 200 Ark. 376, 139 S.W.2d 27 (1940).

Statute of Limitations.

In the action by the assignee of a cause of action not made assignable by statute, the assignor is a necessary party plaintiff, and where no offer is made to make him a party until the statute of limitation has expired, the action is barred. *Temple Cotton Oil Co. v. Davis*, 167 Ark. 448, 268 S.W. 38 (1925).

Sureties.

Surety of contractor who completes contract may sue thereon. *Chapman & Dewey Land Co. v. Wilson*, 91 Ark. 30, 120 S.W. 391 (1909).

Tort Claims.

Tort claims are not made assignable by statute, and an assignee maintaining action on such claims must join his assignors. *Young v. Garrett*, 149 F.2d 223 (8th Cir. 1945).

Cited: *Perryman v. Hackler*, 323 Ark. 500, 916 S.W.2d 105 (1996).

16-61-113. Interpleader generally.

Where, in an action for the recovery of real or personal property, any person having an interest in the property applies to be made a party, the court may order it to be done.

History. Civil Code, § 37; C. & M. Dig., § 1102; Pope's Dig., § 1318; A.S.A. 1947, § 27-815.

CASE NOTES

ANALYSIS

Purpose.
Administrators.
Assignee pendente lite.
Creditors.
Leases.
Necessary parties.
Pleadings.

Quieting title.
Time for intervention.

Purpose.

It is obviously the intention of this section to require all persons to be made parties to an action who will be necessarily and materially affected by its results, and to forbid the court from determining

any controversy between the parties before it when it cannot be done without prejudice to the rights of others or by saving their rights. *Smith v. Moore*, 49 Ark. 100, 4 S.W. 282 (1886); *Thompson v. Grace*, 91 Ark. 52, 120 S.W. 397 (1909).

Administrators.

Administrator appointed after commencement of action has right to intervene in action of replevin. *Lambert v. Tucker*, 83 Ark. 416, 104 S.W. 131 (1907). See *Carpenter v. Carpenter*, 88 Ark. 169, 113 S.W. 1032 (1908).

Assignee Pendente Lite.

When the plaintiff's title and interest in the note sued on has been assigned to another, during the suit, the court in its discretion may substitute the assignee as plaintiff in the suit or continue it in the original name. *Ivey v. Drake*, 36 Ark. 228 (1880).

Creditors.

Where a railroad company was sued in two counties by various creditors of a contractor to whom it was indebted for construction work, they holding claims in excess of its indebtedness to such contractor, it was entitled to file a bill in nature of interpleader in either county and to ask that all the claimants be brought in and have their claims adjusted and the amounts distributed. *Chicago, R.I. & Pac. Ry. v. Moore*, 92 Ark. 446, 123 S.W. 233 (1909).

Leases.

When tenant is sued in ejectment, his lessor may be made a party. *Jackson v. Allen*, 30 Ark. 110 (1875).

Lessee voluntarily taking an independent lease from each of two adverse claimants to real estate cannot compel the two to interplead to litigate their titles and the validity of their leases. *Standley v. Roberts*, 59 F. 836 (8th Cir. 1894), appeal dismissed, 17 S. Ct. 999, 41 L. Ed. 1177 (1896).

In ejectment action, one claiming independently of both parties is not entitled to be made a party. *Tallman v. McGahhey*, 164 Ark. 205, 261 S.W. 306 (1924).

Where lease covered tract of land, non-participating royalty holders were necessary parties to suit to cancel lease by landowner on the ground of abandonment of portion of tract, even though decree specified that it did not affect non-participating royalty holders. *Hunt v. McWilliams*, 218 Ark. 922, 240 S.W.2d 865 (1950).

Necessary Parties.

All persons who have an interest in the matter to be determined by the court must be made parties before issuance of any decree by the court. *Hunt v. McWilliams*, 218 Ark. 922, 240 S.W.2d 865 (1950).

Pleadings.

Where one who is made a party defendant on her own motion desires cross-relief against a codefendant, she must make her answer a cross-bill and pray relief, and must serve process on him unless he enters his appearance. *Luttrell v. Reynolds*, 63 Ark. 254, 37 S.W. 1051 (1896).

Quieting Title.

Where deposition of plaintiff in action to quiet title showed that wife owned half interest in purchase money of land in controversy, she was a necessary party. *Stacy v. Stacy*, 175 Ark. 763, 300 S.W. 437 (1927).

Time for Intervention.

In interplea between administratrix and defendant claiming as joint tenant of intestate, intervention of intestate's creditor raising question of fraudulent conveyance not filed until after decree had been rendered, was held properly dismissed since after litigation has progressed to final judgment or decree it is too late for third person to be allowed to intervene as parties thereto. *Ferrell v. Holland*, 205 Ark. 523, 169 S.W.2d 643 (1943).

16-61-114. Interpleader by defendant.

(a) Upon affidavit of a defendant, before answer in any action upon contract or for the recovery of personal property, that some third party, without collusion with him or her, has or makes a claim to the subject of the action, and that he or she is ready to pay or dispose thereof, as the court may direct, the court may:

(1) Make an order for the safekeeping, for the payment or deposit in court, or for delivery of the subject of the action to such person as it may direct; and

(2) Make an order requiring the third party to appear in a reasonable time and maintain or relinquish his or her claim against the defendant; and

(3) In the meantime stay the proceedings.

(b)(1) If the third party, being served with a copy of the order, fails to appear, the court may declare him or her barred of all claims in respect to the subject of the action against the defendant therein.

(2) If he or she appears, he or she shall be allowed to make himself or herself defendant in the action, in lieu of the original defendant, who shall be discharged from all liability to either of the other parties, in respect to the subject of the action, upon his or her compliance with the order of the court for the payment, deposit, or delivery thereof.

History. Civil Code, § 38; Acts 1875 Dig., §§ 1103, 1104; Pope's Dig., §§ 1319, 1320; A.S.A. 1947, §§ 27-817, 27-818.

CASE NOTES

ANALYSIS

Chancery court.
Husband and wife.
Intervener's interest.

Chancery Court.

This section did not prevent the filing of a bill of interpleader in the chancery court. *Chicago, R.I. & Pac. Ry. v. Moore*, 92 Ark. 446, 123 S.W. 233 (1909).

Husband and Wife.

While a husband and wife were residing on lands which were the separate property of the wife, the husband conveyed the lands to a trustee to secure the payment of

a debt. The trustee sold the land and made a deed to the purchaser and the husband acknowledged himself to be tenant of the purchaser. In an action by the purchaser for possession, it was held that the wife should be admitted as a defendant. *Chaffe & Bro. v. Oliver*, 3 F. 609 (C.C.E.D. Ark. 1880).

Intervener's Interest.

In order to intervene, the intervener's interest must be direct and immediate. *Caldwell v. Guardian Trust Co.*, 26 F.2d 218 (8th Cir. 1928).

Cited: *Gilbert v. Gilbert*, 180 Ark. 596, 22 S.W.2d 32 (1929); *Baker v. Taylor & Co.*, 218 Ark. 538, 237 S.W.2d 471 (1951).

16-61-115. Interpleader in action against sheriff for recovery of property or proceeds.

(a) The provisions of § 16-61-114 shall be applicable to an action brought against a sheriff, or other officer, for the recovery of personal property taken by him or her under an execution, or for the proceeds of the property so taken or sold by him or her.

(b) The defendant in any such action shall be entitled to the benefit of § 16-61-114 against the party in whose favor the execution issued, upon exhibiting to the court the process under which he or she acted, with his or her affidavit that the property, for the recovery of which, or its proceeds, the action was brought, was taken under such process.

(c) In an action against a sheriff, or other officer, for the recovery of property taken under an execution, the court may, upon the application

of the defendant, and of the party in whose favor the execution issued, permit the latter to be substituted as the defendant, security for the costs being given.

History. Civil Code, §§ 39, 40; C. & M. Dig., §§ 1105, 1106; Pope's Dig., §§ 1321, 1322; A.S.A. 1947, §§ 27-819, 27-820.

CASE NOTES

Discretion of Court.

The power of substitution authorized by this section is discretionary with the

court. *Ferguson v. Ehrenberg*, 39 Ark. 420 (1882).

SUBCHAPTER 2 — UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT

SECTION.

- 16-61-201. "Joint tortfeasors" defined.
- 16-61-202. Right of contribution — Accrual — Pro rata share.
- 16-61-203. Judgment against one tortfeasor.
- 16-61-204. Release — Effect on injured person's claim.
- 16-61-205. Release — Effect on right of contribution.
- 16-61-206. Indemnity.

SECTION.

- 16-61-207. Third party practice — Amended complaints — Counterclaims and cross-complaints — Motion practice.
- 16-61-208. Constitutionality.
- 16-61-209. Uniformity of interpretation.
- 16-61-210. Short title.
- 16-61-211. Repeal.
- 16-61-212. Emergency clause.

Publisher's Notes. Although this act was revised in 1955, Arkansas has retained the 1939 version.

For Comments regarding the Uniform Contribution Among Tortfeasors Act, see Commentaries Volume B.

RESEARCH REFERENCES

ALR. Release of, or covenant not to sue, one primarily liable for tort, but expressly reserving rights against one secondarily liable, as bar to recovery against latter. 24 ALR 4th 547.

Contribution from joint tortfeasor who is spouse or otherwise in close familial relationship to injured party. 25 ALR 4th 1120.

Ark. L. Rev. Workmen's Compensation — Contribution and Indemnity — Employer's Liability to Third Party Tortfeasor, 8 Ark. L. Rev. 512.

Comparative Negligence, 9 Ark. L. Rev. 357.

Panel on Settlement Procedures, 11 Ark. L. Rev. 54.

Comparative Negligence in Arkansas: A "Before and After" Survey, 13 Ark. L. Rev. 89.

Family Torts in Automobile Cases, 13 Ark. L. Rev. 299.

Conflict of Laws — Effect of Judgment on Liability of Joint-Tortfeasors, 14 Ark. L. Rev. 343.

Arkansas Model Jury Instructions: Introductory and Closing Instructions, Use of General Verdict and Interrogatories, Negligence, Proximate Cause, Owners and Occupiers of Land, Common Carriers, Railroads, and Comparative Negligence, 20 Ark. L. Rev. 66.

Note, Mary Carter in Arkansas: Settlements, Secret Agreements, and Some Serious Problems, 36 Ark. L. Rev. 570.

Woods, Some Observations on Contributions and Indemnity, 38 Ark. L. Rev. 44.

Note, McDermott, Inc. v. AmClyde: Arkansas's Wake-Up Call in Accounting for Settlements in Multi-Defendant Litigation?, 48 Ark. L. Rev. 1027.

UALR L.J. Arkansas Law Survey, Bradley, Civil Procedure, 8 UALR L.J. 107.

CASE NOTES

ANALYSIS

In general.
Construction.
Purpose.
Applicability.
Discretion of court.
Individual liability.
Service of process.
Workers' compensation.

In General.

Arkansas was the first state to adopt the optional version of the Uniform Contribution Among Tortfeasors Act, thus early opting for proportionate assessment of fault between joint tortfeasors. *Elk Corp. v. Builders Transp., Inc.*, 862 F.2d 663 (8th Cir. 1988).

Construction.

Interpretation given this subchapter by the National Conference of Commissioners on uniform state laws is not necessarily binding on the Supreme Court, but it should be adopted unless erroneous or contrary to the settled policy of the state as declared in the opinions of the Supreme Court. *Shultz v. Young*, 205 Ark. 533, 169 S.W.2d 648 (1943).

Purpose.

One of the primary purposes of this subchapter is to prevent a multiplicity of suits. *Kapp v. Bob Sullivan Chevrolet Co.*, 234 Ark. 395, 353 S.W.2d 5 (1962).

Applicability.

This subchapter applies to joint tortfeasors who are also joint adventurers. *United States Fire Ins. Co. v. State Farm Fire & Cas. Co.*, 246 Ark. 1269, 441 S.W.2d 787 (1969).

This subchapter is inapplicable where there has been a judgement and satisfaction based on a purely derivative theory. *Barnett v. Isabell*, 282 Ark. 88, 666 S.W.2d 393 (1984).

Discretion of Court.

Invoking of remedy afforded by this act is discretionary with the trial court. *Kapp v. Bob Sullivan Chevrolet Co.*, 234 Ark. 395, 353 S.W.2d 5 (1962).

Individual Liability.

Individual liability of joint tortfeasors to the injured party is unaffected by this subchapter. One defendant may proceed against others liable to the injured party for his pro rata share, but this does not affect the right of the injured party to recover from the joint tortfeasors individually or collectively. *Dunaway v. Troutt*, 232 Ark. 615, 339 S.W.2d 613 (1960).

Service of Process.

In suit under this law, service on non-resident motorist could be obtained under the provisions of § 16-58-121(a). *Burnett v. Agent*, 227 Ark. 1050, 303 S.W.2d 575 (1957).

Workers' Compensation.

Where an action involves both this subchapter and the Workers' Compensation Act, it is in the interest of public policy and in keeping with the intent of the General Assembly to give the compensation act priority as an exclusive remedy. Therefore, in matters involving worker's compensation benefits the employer shall be immune from third party tortfeasors claim. *W.M. Bashlin Co. v. Smith*, 277 Ark. 406, 643 S.W.2d 526 (1982).

Cited: *McKennon v. Jones*, 219 Ark. 671, 244 S.W.2d 138 (1951); *Citizens Coach Co. v. Wright*, 228 Ark. 1143, 313 S.W.2d 94 (1958); *Industrial Farm Home Gas Co. v. McDonald*, 234 Ark. 744, 355 S.W.2d 174 (1962); *Safeway Stores, Inc. v. Shwayder Bros.*, 238 Ark. 768, 384 S.W.2d 473 (1964); *Wheaton Van Lines v. Williams*, 240 Ark. 280, 399 S.W.2d 258 (1966); *Morison v. GMC*, 428 F.2d 952 (8th Cir. 1970); *International Harvester Co. v. Burks Motors, Inc.*, 252 Ark. 816, 481 S.W.2d 351 (1972); *Welter v. Curry*, 260 Ark. 287, 539 S.W.2d 264 (1976); *Dulin v. Circle F Indus., Inc.*, 558 F.2d 456 (8th Cir. 1977); *Martin v. United States*, 448 F. Supp. 855 (E.D. Ark. 1977); *Harvey v. Eastman Kodak Co.*, 271 Ark. 783, 610 S.W.2d 582 (1981); *Douglas v. United States Tobacco Co.*, 670 F.2d 791 (8th Cir. 1982); *Missouri P.R.R. v. Champlin & Wells, Inc.*, 600 F. Supp. 182 (E.D. Ark.

1985); *Missouri Pac. R.R. v. Champlin & Wells, Inc.*, 775 F.2d 255 (8th Cir. 1985); *Martin Farm Enters., Inc. v. Hayes*, 320 Ark. 205, 895 S.W.2d 535 (1995).

16-61-201. "Joint tortfeasors" defined.

For the purpose of this subchapter the term "joint tortfeasors" means two (2) or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them.

History. Acts 1941, No. 315, § 1; A.S.A. 1947, § 34-1001.

RESEARCH REFERENCES

UALR L.J. Notes, Tort Law — General Release Forms — The Free Ride for Joint Tortfeasors Is Over, 12 UALR L.J. 791.

CASE NOTES

ANALYSIS

Appeal.
Common liability.
Joint tortfeasors.
Judgment-proof defendant.
Principal-agent relationship.
Proper joint tortfeasors.
Time for determination of liability.

Appeal.

Where only one of two joint tortfeasors appealed from a judgment against them and obtained a reversal, the jury on the second trial was not limited in its judgment against the tortfeasor to the amount of the judgment in the first trial against the tortfeasor who did not appeal, but plaintiff's first satisfaction must be credited to any subsequent satisfaction he seeks. *Woodward v. Blythe*, 249 Ark. 793, 462 S.W.2d 205 (1971).

Common Liability.

It is not necessary that the parties act in concert in order to be liable as joint tortfeasors. *Applegate v. Riggall*, 229 Ark. 773, 318 S.W.2d 596 (1958).

In view of this section it is clear that before there can be any contribution it must appear that at least originally the person seeking contribution and the person from whom contribution is sought must have been under a common legal liability to the injured party. *Cox v.*

Maddux, 255 F. Supp. 517 (E.D. Ark. 1966).

Defendant's argument was flawed where action was for breach of contract since subchapter applies only to persons liable for torts, and defendant did not show that person seeking contribution and person from whom contribution was sought were under a common legal liability to injured party. *Roberts & Co. v. Sergio*, 22 Ark. App. 58, 733 S.W.2d 420 (1987).

Even if the parties' tortious acts are temporally separate, if they caused the same injury or loss, the parties are jointly liable. *Arthur Young & Co. v. Reves*, 937 F.2d 1310 (8th Cir. 1991), cert. denied, 502 U.S. 1092, 112 S. Ct. 1165, 117 L. Ed. 2d 411 (1992), aff'd, 507 U.S. 170, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993).

Joint Tortfeasors.

Arkansas law permits a plaintiff to seek contribution from defendant as a "joint tortfeasor", and plaintiff's contribution action was not defeated merely because the tort liability shared by the two insurers arose by virtue of principles of vicarious liability. *Redland Ins. Co. v. Shelter Mut. Ins. Co.*, 193 F.3d 1021 (8th Cir. 1999).

Judgment-Proof Defendant.

The law does not presume that full recovery can be defeated because one or

more of the defendants may be execution proof. *Little v. Miles*, 213 Ark. 725, 212 S.W.2d 935 (1948).

Principal-Agent Relationship.

While indemnity is commonly granted where liability has been imposed on a person not because of any fault on his part but solely because of his relationship to the one at fault, this doctrine did not apply to a railroad's indemnity claim against a truck driver since there was no employer-employee or other agency type relationship between the railroad and the driver on which to base imputation of liability. *Missouri P.R.R. v. Star City Gravel Co.*, 592 F.2d 455 (8th Cir. 1979).

Proper Joint Tortfeasors.

If purchaser of chemical distributes it by plane over its crop, and crop of plaintiff is damaged, and plaintiff files suit against the purchaser of the chemical for damages, nonresident chemical corporation who sold it was a proper joint defendant as use of chemical was inherently dangerous to other crops. *Chapman Chem. Co. v. Taylor*, 215 Ark. 630, 222 S.W.2d 820 (1949).

Where husband while driving wife's car to work collided with unlighted trailer of defendants which was being pulled by a tractor, relative to the damage done to wife's car, husband and defendants were

joint tortfeasors. *Wymer v. Dedman*, 233 Ark. 854, 350 S.W.2d 169 (1961).

Where court concluded that the accounting firm and all of the settling defendants were joint tortfeasors, it was correct to credit the verdict against the firm with the settlement proceeds. *Arthur Young & Co. v. Reves*, 937 F.2d 1310 (8th Cir. 1991), cert. denied, 502 U.S. 1092, 112 S. Ct. 1165, 117 L. Ed. 2d 411 (1992), aff'd, 507 U.S. 170, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993).

Time for Determination of Liability.

The question of the joint or common liability of the joint tortfeasors is determined as of the time the cause of action accrues and not at the time when the right to recover contribution is asserted, but where the jury, by its verdict, obviously found that defendant was neither jointly nor severally liable for the injury to the plaintiff, there simply was no way under the statutory definition that the defendant could be considered as a joint tortfeasor. *Scalf v. Payne*, 266 Ark. 231, 583 S.W.2d 51 (1979).

Cited: *Arhart v. Micro Switch Mfg. Co.*, 798 F.2d 291 (8th Cir. 1986); *Boatmen's Nat'l Bank v. Cole*, 329 Ark. 209, 947 S.W.2d 362 (1997); *Hurst v. Dixon*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 326 (May 20, 2004).

16-61-202. Right of contribution — Accrual — Pro rata share.

- (1) The right of contribution exists among joint tortfeasors.
- (2) A joint tortfeasor is not entitled to a money judgment for contribution until he or she has by payment discharged the common liability or has paid more than his or her pro rata share thereof.
- (3) A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement.
- (4) When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares solely for the purpose of determining their rights of contribution among themselves, each remaining severally liable to the injured person for the whole injury as at common law.

History. Acts 1941, No. 315, § 2; 1949, No. 35, § 1; A.S.A. 1947, § 34-1002.

RESEARCH REFERENCES

Ark. L. Notes. Brill, Punitive Damages in Ark. — Expanded? Restricted?, 1990 Ark. L. Notes 25.

Ark. L. Rev. Acts 1949 General Assembly — Act 35 Amendment of Uniform

Contribution Among Tortfeasors Act, 3 Ark. L. Rev. 371.

UALR L.J. Arkansas Law Survey, Roberts and Deere, Torts, 8 UALR L.J. 207.

CASE NOTES

ANALYSIS

Applicability.

Cause of action.

Entitlement to contribution.

—Apportionment.

Indemnity.

Limitation of actions.

Retroactivity.

Settlements.

Applicability.

Where, in an action for damages for personal injuries against joint tortfeasors the court was unable to determine from the jury's verdict that the verdict was based on any disproportionate fault on part of two defendants this section could not be applied to save or clarify the situation. *Shearman Concrete Pipe Co. v. Wooldridge*, 218 Ark. 16, 234 S.W.2d 382 (1950).

Cause of Action.

A cause of action for contribution arises with the underlying tort, and not upon payment of common liability. *Union Pac. R.R. v. Mullen*, 966 F.2d 348 (8th Cir. 1992).

Entitlement to Contribution.

In action where wife recovered against defendants for damage to her car and husband recovered for personal injuries, defendants, upon discharging judgment obtained against them by wife, will be entitled to file motion for judgment for contribution from husband. *Wymer v. Dedman*, 233 Ark. 854, 350 S.W.2d 169 (1961).

Joint tortfeasor was required to contribute to the interest paid on judgment by other tortfeasor where no interest on payment between the date of payment and the date of the money judgment was allowed and where no more than the legal rate of interest was paid. *International Harvester Co. v. Burks Motors, Inc.*, 252 Ark. 816, 481 S.W.2d 351 (1972).

Defendant was not entitled to contribution from plaintiff father who was not liable to injured children and who was not thereby a joint tortfeasor with defendant. *Welter v. Curry*, 260 Ark. 287, 539 S.W.2d 264 (1976).

The adoption of comparative fault did not prevent a joint tortfeasor whose fault had been determined to be in the amount of 50 percent or more from having contribution from his fellow tortfeasor who was less negligent. *Missouri Pac. R.R. v. Star City Gravel Co.*, 452 F. Supp. 480 (E.D. Ark. 1978), *aff'd*, 592 F.2d 455 (8th Cir. 1979).

A claim for contribution among tortfeasors is a derivative or conditional action in that the contribution-claimant, e.g., the third-party plaintiff (defendant), is not entitled to a money judgment against the party from whom contribution is sought, e.g., the third-party defendant, until the third-party plaintiff has paid more than his pro rata share of their common liability. *Martin Farm Enters., Inc. v. Hayes*, 320 Ark. 205, 895 S.W.2d 535 (1995).

—Apportionment.

When the evidence is sufficient, the jury is permitted to appraise the conduct of each defendant and to undertake, as fairly as practicable, to fix the responsibility of each. *Little v. Miles*, 213 Ark. 725, 212 S.W.2d 935 (1948).

Where apportionment of damages required payment of shares solely for the purpose of determining rights of contribution among joint tortfeasors, each tortfeasor remaining severally liable to the injured person for the whole injury as at common law, determination of apportioned judgments by jury would not be disturbed. *Wheaton Van Lines, Inc. v. Williams*, 240 Ark. 280, 399 S.W.2d 258 (1966).

In a wrongful death action against two

or more joint tortfeasors, plaintiff was not required to prove the precise injury to the decedent caused by the negligence of each tortfeasor. *Woodward v. Blythe*, 249 Ark. 793, 462 S.W.2d 205 (1971).

Jury found that one defendant was partially responsible for plaintiff's damages and second defendant was also responsible; this meant that first defendant was entitled to contribution from the second defendant to the extent of his liability. *Burks Motors, Inc. v. International Harvester Co.*, 250 Ark. 29, 466 S.W.2d 907 (1971).

Defendant against whom a joint and several judgments had been entered was not entitled to a judgment against codefendant until it had paid more than its pro rata share. *Burks Motors, Inc. v. International Harvester Co.*, 250 Ark. 641, 466 S.W.2d 943 (1971); *Shelton v. Firestone Tire & Rubber Co.*, 281 Ark. 100, 662 S.W.2d 473 (1983).

Since the defendant did not ask the trial court to apportion the damages according to relative degrees of fault, as allowed by subdivision (4), and the jury made no factual findings which would support such apportionment, the defendant was only entitled to contribution from the codefendant for any amounts which it paid above one half of the judgment. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. First Nat'l Bank*, 774 F.2d 909 (8th Cir. 1985).

Indemnity.

Suit by utility to recover from contractor amount of damages it was required to pay for injuries sustained by employee of contractor under agreement by contractor to hold utility harmless from suits for personal injuries was not a suit for contribution of joint tortfeasor but a suit under indemnity agreement. *Bruno v. Bruno*, 221 Ark. 759, 256 S.W.2d 341 (1953).

Contribution and indemnity are mutually exclusive remedies because the former distributes the loss among tortfeasors while the latter shifts the entire loss from one tortfeasor who has been compelled to pay it to the shoulders of another who should bear it instead. *Missouri Pac. R.R. v. Star City Gravel Co.*, 452 F. Supp. 480 (E.D. Ark. 1978), *aff'd*, 592 F.2d 455 (8th Cir. 1979).

Limitation of Actions.

In suit by injured person to recover damages from defendant, the latter was

not prevented from filing third party complaint for contribution from joint tortfeasor notwithstanding right of plaintiff in suit against the third party defendant was barred by statute of limitations. *Schott v. Colonial Baking Co.*, 111 F. Supp. 13 (W.D. Ark. 1953).

Retroactivity.

This subchapter is not retroactive and it appears to have been settled prior to its enactment that contribution among joint tortfeasors did not exist. *Commercial Cas. Ins. Co. v. Leonard*, 210 Ark. 575, 196 S.W.2d 919 (1946).

Settlements.

Joint tortfeasor was not entitled to judgment of contribution against other tortfeasor, as each tortfeasor settled his liability separately from the other. *Lacewell v. Griffin*, 214 Ark. 909, 219 S.W.2d 227 (1949).

Where the settlement of a judgment by a tortfeasor provided that the payment was in full for all claims accruing to the injured person but did not mention joint tortfeasors, settlement did not release the joint tortfeasor of liability and the tortfeasor was not entitled to contribution from the joint tortfeasor. *Allbright Bros., Contractors ex rel. Nat'l Sur. Corp. v. Hull-Dobbs Co.*, 209 F.2d 103 (6th Cir. 1953).

In an action for damages arising out of train-truck collision at railroad crossing, the fact that an employee of railroad might have had cause of action against owner of truck for the injuries suffered and that the railroad's settlement with its employee was purely voluntary, would not in itself justify withdrawing this part of claim, which was made by the railroad against driver of truck on the basis of contribution between joint tortfeasors, from the consideration of the jury. *Missouri Pac. R.R. Co. v. Ellison*, 250 Ark. 160, 465 S.W.2d 85 (1971).

Cited: *Ward v. Walker*, 206 Ark. 988, 178 S.W.2d 62 (1944); *Citizens Coach Co. v. Wright*, 228 Ark. 1143, 313 S.W.2d 94 (1958); *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1968); *Morison v. GMC*, 428 F.2d 952 (5th Cir. 1970); *W.M. Bashlin Co. v. Smith*, 227 Ark. 406, 643 S.W.2d 526 (1982); *Douglas v. United States Tobacco Co.*, 670 F.2d 791 (8th Cir. 1982); *Arhart v. Micro Switch Mfg. Co.*, 798 F.2d 291 (8th

Cir. 1986); *Stewman v. Mid-South Wood Prods. of Mena, Inc.*, 784 F. Supp. 611 (W.D. Ark. 1992); *Boatmen's Nat'l Bank v. Cole*, 329 Ark. 209, 947 S.W.2d 362 (1997); *Redland Ins. Co. v. Shelter Mut. Ins. Co.*, 193 F.3d 1021 (8th Cir. 1999).

16-61-203. Judgment against one tortfeasor.

Nothing in this subchapter shall be construed to effect the several joint tortfeasors' common law liability to have judgment recovered and payment made from them individually by the injured person for the whole injury; but the recovery of a judgment by the injured person against one (1) joint tortfeasor does not discharge the other joint tortfeasor.

History. Acts 1941, No. 315, § 3; A.S.A. 1947, § 34-1003.

CASE NOTES

ANALYSIS

In general.
Judgment.
Settlement.

In General.

Individual liability of joint tortfeasors to the injured party is unaffected by this subchapter. One defendant may proceed against others liable to the injured party for his pro rata share, but this does not affect the right of the injured party to recover from the joint tortfeasors individually or collectively. *Dunaway v. Troutt*, 232 Ark. 615, 339 S.W.2d 613 (1960).

Judgment.

The recovery of a judgment by the in-

jured person against one joint tortfeasor did not discharge the other joint tortfeasor. *Smith v. Tipps Eng'g & Supply Co.*, 231 Ark. 952, 333 S.W.2d 483 (1960).

Settlement.

Where the settlement of a judgment by a tortfeasor provided that the payment was in full for all claims accruing to the injured person but did not mention joint tortfeasors, the settlement did not release the joint tortfeasor from liability and the tortfeasor was not entitled to contribution from the joint tortfeasor. *Allbright Bros., Contractors ex rel. Nat'l Sur. Corp. v. Hull-Dobbs Co.*, 209 F.2d 103 (6th Cir. 1953).

16-61-204. Release — Effect on injured person's claim.

A release by the injured person of one (1) joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.

History. Acts 1941, No. 315, § 4; A.S.A. 1947, § 34-1004.

RESEARCH REFERENCES

UALR L.J. Notes, Tort Law — General Release Forms — The Free Ride for Joint Tortfeasors Is Over, 12 UALR L.J. 791.

CASE NOTES

ANALYSIS

Purpose.

Release.

—Content or form.

—Release before verdict.

Retroactivity.

Time for determining liability.

Purpose.

It was the intention of the Arkansas Legislature in enacting this section to abrogate the common law rule that a release of one tortfeasor released all other tortfeasors jointly liable for the occurrence, thereby retaining the liability of joint tortfeasors. *Moore v. Missouri Pac. R.R.*, 299 Ark. 232, 773 S.W.2d 78 (1989).

Release.

Where the settlement of a judgment by a tortfeasor provided that the payment was in full for all claims accruing to the injured person but did not mention joint tortfeasors, settlement did not release the joint tortfeasor of liability and the tortfeasor was not entitled to contribution from the joint tortfeasor. *Allbright Bros., Contractors ex rel. Nat'l Sur. Corp. v. Hull-Dobbs Co.*, 209 F.2d 103 (6th Cir. 1953).

In an action against an automobile manufacturer for injuries sustained in an accident, the passenger's release of driver and her liability insurer contained a clause releasing "all other persons, firms, or corporations liable or who might be claimed to be liable," therefore barring the action, even though the parties did not intend to release the manufacturer and the manufacturer paid no consideration. *Morison v. GMC*, 428 F.2d 952 (5th Cir.), cert. denied, 400 U.S. 904, 91 S. Ct. 142, 27 L. Ed. 2d 141 (1970).

Where plaintiff, who had brought a malpractice action, settled and dismissed the action for the consideration and executed a general release discharging her doctor and "all other persons, firms, corporations..." that general release was sufficient to release joint tortfeasors who were not parties to the release since this section provides that other tortfeasors are discharged "if the release so provides." *Douglas v. United States Tobacco Co.*, 670 F.2d 791 (8th Cir. 1982).

—Content or Form.

In order to satisfy the language of this section, a release must name or otherwise specifically identify the tortfeasors to be discharged. Broad boilerplate language is not sufficient. *Moore v. Missouri Pac. R.R.*, 299 Ark. 232, 773 S.W.2d 78 (1989).

—Release Before Verdict.

Under this subchapter, joint tortfeasors are entitled to have the amount due plaintiff reduced by the amount paid by a joint tortfeasor, but if evidence as to the amount paid by one of the tortfeasors is introduced into evidence in trial against the other tortfeasor, the defendant cannot, after verdict, have the court reduce the amount of the verdict by the amount paid by the other defendant, as he has had the benefit of the amount paid by the other tortfeasor, when he introduced the amount of the settlement before the jury reached its verdict. *Giem v. Williams*, 215 Ark. 705, 222 S.W.2d 800 (1949).

Trial court properly refused to permit tortfeasor to introduce settlement agreement between second tortfeasor and injured party, even though it might have had some bearing on the plaintiff's credibility, as the evidence would have informed the jury that one of the defendants had admitted liability and would have been used for arguing that plaintiff had accepted the amount of settlement as fair compensation for his injuries. *Walton v. Tull*, 234 Ark. 882, 356 S.W.2d 20 (1962).

In this case the trial court refused the defendant permission to introduce evidence of one tortfeasor's settlement payment to plaintiff, but after verdict the trial court, under the theory that the law of joint tortfeasors applied, correctly credited the judgment with the payment, since the jury had no knowledge of the settlement, and therefore assessed the total damages of plaintiff. *Woodard v. Holliday*, 235 Ark. 744, 361 S.W.2d 744 (1962).

Where settlement was made during the course of trial by one or more joint tortfeasors, the trial court committed no error in advising the jury of the fact, but not the amount, of the settlement. *Arhart v. Micro Switch Mfg. Co.*, 798 F.2d 291 (8th Cir. 1986).

Retroactivity.

It was held that enactment of this section would not be given a retroactive ef-

fect. *Kansas City S. Ry. Co. v. McDaniel*, 131 F.2d 89 (1942).

Time for Determining Liability.

The question of the joint or common liability of joint tortfeasors is determined as of the time the cause of action accrues and not at the time when the right to recover contribution is asserted; but where the jury, by its verdict, obviously found that defendant was neither jointly nor severally liable for the injury to the plaintiff, there simply was no way under

the statutory definition that the defendant could be considered as a joint tortfeasor. *Scalf v. Payne*, 266 Ark. 231, 583 S.W.2d 51 (1979).

Cited: *Hill v. Southside Pub. Sch.*, 688 F. Supp. 493 (E.D. Ark. 1988); *Garver & Garver v. Little Rock San. Sewer Comm.*, 300 Ark. 620, 781 S.W.2d 24 (1989); *Arthur Young & Co. v. Reves*, 937 F.2d 1310 (8th Cir. 1991), cert. denied, 502 U.S. 1092, 112 S. Ct. 1165, 117 L. Ed. 2d 411 (1992), aff'd, 507 U.S. 170, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993).

16-61-205. Release — Effect on right of contribution.

A release by the injured person of one (1) joint tortfeasor does not relieve him or her from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person's damages recoverable against all the other tortfeasors.

History. Acts 1941, No. 315, § 5; A.S.A. 1947, § 34-1005.

RESEARCH REFERENCES

UALR L.J. *Arkansas Law Survey*, Roberts and Deere, Torts, 8 UALR L.J. 207. Notes, Tort Law — General Release

Forms — The Free Ride for Joint Tortfeasors Is Over, 12 UALR L.J. 791.

CASE NOTES

ANALYSIS

Jury findings.
Limitation of actions.
Subrogation.

Jury Findings.

In personal injury action where court submitted special interrogatory as to what actual damages, if any, were sustained by plaintiff without reference to amount of settlement previously made by certain tortfeasors, finding of jury in response thereto could not be construed as a finding of damages after deduction of the settlement. *Bailey v. Stewart*, 236 Ark. 80, 364 S.W.2d 662 (1963).

Limitation of Actions.

In suit by injured person to recover damages from defendant, the latter was

not prevented from filing third party complaint for contribution from joint tortfeasor notwithstanding right of plaintiff in suit against the third party defendant was barred by statute of limitations. *Schott v. Colonial Baking Co.*, 111 F. Supp. 13 (W.D. Ark. 1953).

Subrogation.

Release executed by injured person did not destroy the person's right to seek contribution and insurance company which would be subrogated to such rights was not thereby deprived of any rights it would have otherwise had. *M.F.A. Mut. Ins. Co. v. Mullin*, 156 F. Supp. 445 (1957).

Cited: *Bailey v. Stewart*, 238 Ark. 666, 385 S.W.2d 20 (1964); *Morison v. GMC*, 428 F.2d 952 (5th Cir. 1970), cert. denied, 400 U.S. 904, 91 S. Ct. 142, 27 L. Ed. 2d 141 (1970).

16-61-206. Indemnity.

This subchapter does not impair any right of indemnity under existing law.

History. Acts 1941, No. 315, § 6;
A.S.A. 1947, § 34-1006.

CASE NOTES**In General.**

Due to this section, this subchapter did not bar plaintiff from full indemnity for defendant's breach of covenant. *Anthony v. Louisiana & Ark. Ry.*, 316 F.2d 858 (8th

Cir. 1963), cert. denied, 375 U.S. 830, 84 S. Ct. 74, 11 L. Ed. 2d 61 (1963).

Cited: *Douglas v. United States Tobacco Co.*, 670 F.2d 791 (8th Cir. 1982).

16-61-207. Third party practice — Amended complaints — Counterclaims and cross-complaints — Motion practice.

(1) Before answering, a defendant seeking contribution in a tort action may move *ex parte* or, after answering, on notice to the plaintiff, for leave as a third party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable as a joint tortfeasor to him or her to the plaintiff for all or part of the plaintiff's claim against him or her. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third party defendant, shall make his or her defense to the complaint of the plaintiff and to the third party complaint in the same manner as defenses are made by an original defendant to an original complaint. The third party defendant may assert any defenses which the third party plaintiff has to the plaintiff's claim. The plaintiff may amend his or her pleadings to assert against the third party defendant any claim which the plaintiff might have asserted against the third party defendant had he or she been joined originally as a defendant. The third party defendant is bound by the adjudication of the third party plaintiff's liability to the plaintiff as well as of his or her own liability to the plaintiff and to the third party plaintiff. A third party defendant may proceed under this section against any person not a party to the action who is or may be liable as a joint tortfeasor to him or her or to the third party plaintiff for all or part of the claim made in the action against the third party defendant.

(2) When a counterclaim is asserted against a plaintiff he or she may cause a third party to be brought in under circumstances which under this section would entitle a defendant to do so.

(3) A pleader may either (a) state as a cross-claim against a coparty any claim that the coparty is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant; or (b) move for judgment for contribution against any other joint judgment debtor, where in a single action a judgment has been entered against joint tortfeasors one (1) of whom has discharged the judgment

by payment or has paid more than his or her pro rata share thereof. If relief can be obtained as provided in this subsection no independent action shall be maintained to enforce the claim for contribution.

(4) The court may render such judgments, one (1) or more in number, as may be suitable under the provisions of this subchapter.

(5) As among joint tortfeasors against whom a judgment has been entered in a single action, the provisions of § 16-61-202(4) apply only if the issue of proportionate fault is litigated between them by cross-complaint in that action.

(6) In the event plaintiff or defendant fails to serve third parties in such time and manner as may be required for third parties to be brought in and for service on the same to have matured on the day set for the original proceedings between the original parties, such failure shall not delay prosecution of proceedings between the original parties or impair the original defendant's right of contribution.

History. Acts 1941, No. 315, § 7;
A.S.A. 1947, § 34-1007; Acts 1993, No.
759, § 1.

RESEARCH REFERENCES

Ark. L. Rev. Panel on Comparative Negligence — Third Party Practice, 10 Ark. L. Rev. 88.

UALR L.J. Legislative Survey, Civil Procedure, 16 UALR L.J. 85.

CASE NOTES

ANALYSIS

Comparative fault.

Complaint.

Entitlement to file.

— Discretion of court.

Federal rule.

Limitation of actions.

Reversible error.

Settlement.

Third-party defendants.

Comparative Fault.

No Arkansas cases suggest that Arkansas follow the substantive comparative fault rule that a plaintiff's degree of fault should always be compared with the fault of other possible wrongdoers, even if plaintiff has asserted no claim against those wrong doers; indeed, given the plain language of § 16-64-122 — that the plaintiff's fault should be compared to that of the parties from whom the plaintiff "seeks to recover damages" — it is hard to imagine how the legislature's words could be construed to reach such a result. *Hiatt v. Mazda Motor Corp.*, 75 F.3d 1252 (8th Cir. 1996).

Complaint.

It would have been more accurate for decedent's administrator to entitle his pleading a cross-claim rather than a third party complaint, but since the difference is merely one of form and can have no effect upon the administrator's statutory right to seek contribution, it would not be prohibited. *Northwest Motors, Inc. v. Creekmore*, 229 Ark. 755, 318 S.W.2d 614 (1958); *Little Rock Land Co. v. Raper*, 245 Ark. 641, 433 S.W.2d 836 (1968).

When the third-party complaint alleges a direct liability of the third-party defendant to the plaintiff on the claim set out in the plaintiff's complaint, the third party shall make his defenses to the complaint and no amendment to the complaint is necessary or required, and the parties are at issue as to their rights respecting the claim without any amendment of the complaint by the plaintiff. *Larson Mach., Inc. v. Wallace*, 268 Ark. 192, 600 S.W.2d 1 (1980).

Entitlement to File.

The right of a defendant to seek contri-

bution from a joint tortfeasor by making him a party to the suit is permissive and does not exclude the right of the defendant to seek contribution in a separate suit. *Rudolph v. Mundy*, 226 Ark. 95, 288 S.W.2d 602 (1956).

If a joint tortfeasor is not made a party to suit against a defendant the defendant does not have to seek contribution against such tortfeasor in that suit, but if the joint tortfeasor is also a party defendant, the defendant must seek contribution in that suit. *Rudolph v. Mundy*, 226 Ark. 95, 288 S.W.2d 602 (1956).

In action where wife recovered against defendants for damage to her car and husband recovered for personal injuries, defendants upon discharging judgment obtained against them by wife will be entitled to file motion for judgment for contribution from husband. *Wymer v. Dedman*, 233 Ark. 854, 350 S.W.2d 169 (1961).

—Discretion of Court.

The trial court has a measure of discretion in allowing or disallowing a defendant to have a joint tortfeasor made a party to the suit for the purpose of seeking contribution. *Rudolph v. Mundy*, 226 Ark. 95, 288 S.W.2d 602 (1956).

Where in suit against one tortfeasor a second alleged tortfeasor was not a party to the suit although the suits were consolidated with two suits in which alleged joint tortfeasor was a party, trial court did not abuse its discretion in refusing to allow defendant to seek contribution where question was not brought to the attention of the trial court until the attorneys were making their opening statements in the cases. *Rudolph v. Mundy*, 226 Ark. 95, 288 S.W.2d 602 (1956).

Federal Rule.

This section specifically makes the adjudication of the third-party defendant's liability to the plaintiff binding upon the third-party defendant; thus the section is different from those patterned after Rule 14 of the Federal Rules of Civil Procedure, under which the plaintiff "may" amend his pleadings to assert a claim against the third-party defendant. *Larson Mach., Inc. v. Wallace*, 268 Ark. 192, 600 S.W.2d 1 (1980).

Limitation of Actions.

In suit by injured person to recover damages from defendant truck owner the

latter was not prevented from filing third party complaint for contribution from joint tortfeasor notwithstanding right of plaintiff in suit against the third party defendant was barred by statute of limitations. *Schott v. Colonial Baking Co.*, 111 F. Supp. 13 (W.D. Ark. 1953).

Because the duty of the third-party defendant to defend against the allegations of the plaintiff, in the complaints against the defendants, existed at the time the third-party defendant was served with the pleadings, and because three years had not then elapsed after the plaintiff was injured, the cause of action was not barred by the statute of limitations even though the plaintiff did not file complaint against third-party defendant until more than four years after injury. *Larson Mach., Inc. v. Wallace*, 268 Ark. 192, 600 S.W.2d 1 (1980).

Because the Arkansas legislature has amended this section to provide that a plaintiff "may" rather than "shall" bring claims he has against a third-party defendant, it is unclear whether *Larson Machine, Inc. v. Wallace*, 268 Ark. 192, 600 S.W.2d 1 (1980) is still good law in Arkansas, even with respect to a plaintiff's untimely claims against third-party defendants. *Hiatt v. Mazda Motor Corp.*, 75 F.3d 1252 (8th Cir. 1996).

Reversible Error.

Error in directing verdict for one defendant while returning verdict for the other defendant was reversible, since the defendant who had the verdict returned against him could have moved for judgment for contribution against the other defendant if jury had returned a verdict against him. *Arkansas La. Gas Co. v. Stracener*, 239 Ark. 1001, 395 S.W.2d 745 (1965).

Settlement.

If administratrix of decedent files a damage suit against contractor and subcontractor to recover damages for death of decedent due to negligence of defendants, and thereafter before trial dismisses case against the subcontractor on payment of a sum, the contractor under this subchapter has the right to still make the subcontractor a third party defendant. *Giem v. Williams*, 215 Ark. 705, 222 S.W.2d 800 (1949).

Third-Party Defendants.

Although this section requires a plaintiff, if he has a claim against third party

defendant, to assert it, it does not require that the plaintiff have an existing claim against the third party defendant, in order for the principal defendant to bring the third party defendant into the case. *Schott v. Colonial Baking Co.*, 111 F. Supp. 13 (W.D. Ark. 1953).

A cause of action held to be stated against person as a third party defendant. *Applegate v. Riggall*, 229 Ark. 773, 318 S.W.2d 596 (1958).

Where the defendants, in filing counterclaim, sought recovery against plaintiff and a third party alleging that the sole proximate cause of collision was their joint and concurrent negligence and filed a motion to make the third party a defendant, it was within the sound discretion of the court to grant the motion. *Talley v. Morphis*, 232 Ark. 91, 334 S.W.2d 652 (1960).

In action against installer of seat belt for injuries received when belt broke during automobile collision defendant installer was, under allegation of plaintiff's third party complaint, entitled under this subchapter to join supplier of seat belts as a third party defendant. *Kapp v. Bob Sullivan Chevrolet Co.*, 234 Ark. 395, 353 S.W.2d 5 (1962).

The plaintiff in an action to enforce an uninsured motorist clause against his insurance company cannot be compelled under this section or § 23-89-405 to join as

third party defendants the alleged tortfeasors, although the defendant insurance company may make the alleged tortfeasors defendants by cross-complaint. *Home Ins. Co. v. Williams*, 252 Ark. 1012, 482 S.W.2d 626 (1972).

Subsection (1) enables one or more of several joint tortfeasors sued by the injured person to add as third-party defendants any fellow joint tortfeasors whom they believe to have been also responsible for the tort complained of and to litigate against them in the injured person's action any claims for contribution; in this way, the interests of justice may be promoted by obviating the necessity of a separate action for contribution. *Martin Farm Enters., Inc. v. Hayes*, 320 Ark. 205, 895 S.W.2d 535 (1995).

Under subdivision (1), the third-party plaintiff is not required to wait until he has paid the judgment to implead in the primary action other persons who are or may be jointly liable for the tort. *Martin Farm Enters., Inc. v. Hayes*, 320 Ark. 205, 895 S.W.2d 535 (1995).

Cited: *Sunday v. Burk*, 172 F. Supp. 722 (W.D. Ark. 1959); *B-W Acceptance Corp. v. Colvin*, 252 Ark. 306, 478 S.W.2d 755 (1972); *Davis v. GMC*, 257 Ark. 983, 521 S.W.2d 214 (1975); *Jack Wood Constr. Co. v. Ford*, 258 Ark. 47, 522 S.W.2d 408 (1975); *Bill C. Harris Constr. Co. v. Powers*, 262 Ark. 96, 554 S.W.2d 332 (1977).

16-61-208. Constitutionality.

If any provision of this subchapter, or the application thereof, to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the subchapter which can be given effect without the invalid provision or application, and to this end the provisions of this subchapter are declared to be severable.

History. Acts 1941, No. 315, § 8.

16-61-209. Uniformity of interpretation.

This subchapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it.

History. Acts 1941, No. 315, § 9; A.S.A. 1947, § 34-1008.

CASE NOTES

Construction.

In an action against an automobile manufacturer for injuries sustained in an accident, the passenger's release of driver and her liability insurer contained a clause releasing "all other persons, firms, or corporations liable or who might be

claimed to be liable," therefore barring the action, even though the parties did not intend to release the manufacturer and the manufacturer paid no consideration. *Morison v. GMC*, 428 F.2d 952 (5th Cir.), cert. denied, 400 U.S. 904, 91 S. Ct. 142, 27 L. Ed. 2d 141 (1970).

16-61-210. Short title.

This subchapter may be cited as the "Uniform Contribution Among Tortfeasors Act."

History. Acts 1941, No. 315, § 10; A.S.A. 1947, § 34-1009.

CASE NOTES

Cited: *Hill v. Southside Pub. Sch.*, 688 F. Supp. 493 (E.D. Ark. 1988).

16-61-211. Repeal.

All acts or parts of acts which are inconsistent with the provisions of this subchapter are hereby repealed.

History. Acts 1941, No. 315, § 11; A.S.A. 1947, § 34-1009n.

16-61-212. Emergency clause.

Because the passage of this subchapter will invite parties litigant to pursue dilatory tactics in the courts of this state until its effective date in order that they may take advantage of its provisions, contrary to the public health, safety, and welfare, an emergency is hereby declared to exist and this subchapter shall take effect and be in full force from and after its passage and approval.

History. Acts 1941, No. 315, § 12; A.S.A. 1947, § 34-1009n. 315, was signed by the Governor and took effect on March 26, 1941.

Publisher's Notes. Acts 1941, No.

CHAPTER 62

SURVIVAL AND ABATEMENT OF ACTIONS

SECTION.

- 16-62-101. Survival of actions — Wrongs to person or property.
- 16-62-102. Wrongful death actions — Survival.
- 16-62-103. Suits involving public officers.

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- 16-62-104. Death or expiration of powers — Effect upon action.
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16-62-107. Revivor of actions against personal representative of defendant.

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16-62-109. Time for revivor — Effect of expiration.

16-62-110. Failure of plaintiff's representatives to revive after notice — Motion to strike.

16-62-111. Trial not postponed by revivor.

Publisher's Notes. Some provisions of this chapter may be superseded by the Arkansas Rules of Civil Procedure pursuant to the Supersession Rule adopted by the Supreme Court of Arkansas in its order of December 18, 1978.

Effective Dates. Acts 1925, No. 109, § 2: approved Feb. 25, 1925. Emergency clause provided: "This act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared, and this act shall take effect and be in force from and after its passage."

Acts 1951, § 5, p. 102: effective on passage.

Acts 1981, No. 625, § 3: Mar. 23, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that the Supreme Court of the State of Arkansas announced in *Sugg v. Continental Oil Co.*, 270 Ark. 882, 608 S.W.2d 1 (1980) that the nonsuit statute, Sec. 21 Revised Statutes, Chapter 91, same being Ark. Stat. 37-222 shall not apply in an action for wrongful death where a nonsuit is suffered more than three years after the death of the person allegedly to have been wrongfully killed, and this Act is needed in order to avoid unnecessary hardships in wrongful death actions and to avoid confusion to provide for the proper administration of

justice. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 2001, No. 1581, § 3: Apr. 13, 2001. Emergency clause provided: "It is found and determined by the General Assembly that under current interpretation of present law certain persons who were financially dependent on a deceased person are, because of age, excluded from being the beneficiary of a wrongful death action; that the current interpretation is inequitable; that this act cures the inequity; and that this act should go into effect as soon as possible so that such persons hereafter will be included as beneficiaries of any wrongful death claim. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

RESEARCH REFERENCES

ALR. Inheritability or descendability of right to contest will. 11 ALR 4th 907.

Beneficiary's death: effect upon right of action under death statute. 13 ALR 4th 1060.

Punitive damages in tort action: claim as surviving death of tortfeasor or person wronged. 30 ALR 4th 707.

Effect of death of party to divorce proceeding pending appeal or time allowed for appeal. 33 ALR 4th 47.

Am. Jur. 1 Am. Jur. 2d, Abat. & R., § 1 et seq.

61A Am. Jur. 2d, Plead., § 1 et seq.

Ark. L. Rev. Cox and Newbern, New Civil Procedure: The Court That Came in From the Code, 33 Ark. L. Rev. 1.

C.J.S. 1 C.J.S., Abat. & R., § 1 et seq.

71 C.J.S., Plead., § 1 et seq.

16-62-101. Survival of actions — Wrongs to person or property.

(a)(1) For wrongs done to the person or property of another, an action may be maintained against a wrongdoer, and the action may be brought by the person injured or, after his or her death, by his or her executor or administrator against the wrongdoer or, after the death of the wrongdoer, against the executor or administrator of the wrongdoer, in the same manner and with like effect in all respects as actions founded on contracts.

(2) Nothing in subdivision (a)(1) of this section shall be so construed as to extend its provisions to actions of slander or libel.

(b) In addition to all other elements of damages provided by law, a decedent's estate may recover for the decedent's loss of life as an independent element of damages.

History. Rev. Stat., ch. 4, §§ 59, 60; C. & M. Dig., §§ 1070, 1071; Pope's Dig., §§ 1273, 1274; A.S.A. 1947, §§ 27-901, 27-902; Acts 2001, No. 1516, § 1.

Amendments. The 2001 amendment redesignated former (a) and (b) as present

(a)(1) and (a)(2) and made related changes; in (a)(1), substituted "a wrongdoer" for "the wrongdoers" and made gender neutral changes; and added present (b).

RESEARCH REFERENCES

Ark. L. Notes. Flaccus, A Grab Bag of Recent Arkansas Cases, 1999 Ark. L. Notes 25.

Ark. L. Rev. Note, The Law of Defamation: An Arkansas Primer, 42 Ark. L. Rev. 915.

Recent Development: Survival Actions

— Defining "Loss of Life" Damages, 57 Ark. L. Rev. 441 (2004).

UALR L.J. Survey of Arkansas Law, Torts, 5 UALR L.J. 191.

Survey of Legislation, 2001 Arkansas General Assembly, Practice, Procedure, and Courts, 24 UALR L.J. 523.

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Construction.

A wrongful-death action brought by a plaintiff in his individual capacity pursuant to § 16-62-102 involves neither the same action nor the same plaintiff as a survival action brought by the plaintiff in his representative capacity on behalf of the decedent's estate pursuant to this section. *Murrell v. Springdale Mem. Hosp.*, 330 Ark. 121, 952 S.W.2d 153 (1997).

Because the phrase "loss of life damages" as used in subsection (b) was clear and unambiguous and since loss-of-life damages could only begin accruing at the point when life was lost, at death, there was no reason to believe the legislature intended to require the decedent to live for a period of time between injury and death in order to recover loss-of-life damages. *Durham v. Marberry*, 356 Ark. 481, 156 S.W.3d 242 (2004).

Accounting.

Where an action was brought for the accounting against a corporate officer whose death occurred after service of notice but before any defensive pleading was filed, executrix could not maintain an action to prohibit the chancery court from proceeding with the original action. *Rider v. Cunningham*, 232 Ark. 407, 337 S.W.2d 868 (1960).

Administration of Estate.

Causes of action for the benefit of the estate of a person wrongfully killed and for the benefit of his widow and next of kin may be united in a suit brought by the decedent's administratrix. *Southern Anthracite Coal Co. v. Hodge*, 99 Ark. 302, 139 S.W. 292 (1911).

When the amount recovered by an administratrix for wrongful death is for the benefit of the estate and there is necessity for further probate proceedings, the judgment should be certified to the probate court, but if no necessity exists, it need not be certified to that court. *Adams v. Shell*, 182 Ark. 959, 33 S.W.2d 1107 (1930).

Any recovery by administratrix for compensation for injuries sustained by deceased as a result of defendant's negligence would be for the benefit of deceased's estate. *Hicks v. Missouri Pac. R.R.*, 181 F. Supp. 648 (W.D. Ark.), appeal dismissed, 285 F.2d 427 (8th Cir. 1960).

Where following a collision, the plaintiff died of unrelated causes, leaving no heirs with standing to bring a lawsuit against the defendant for damages to vehicle since none of the heirs was injured by any action of the defendant. *Daughetee v. Shipley*, 282 Ark. 596, 669 S.W.2d 886 (1984).

It was administrator's duty and right to pursue action, subject to the probate court's approval, and to choose counsel for that purpose. *Cude v. Cude*, 286 Ark. 383, 691 S.W.2d 866 (1985).

Adjustment company could not recover deceased's debt for medical services rendered to the deceased shortly before her death because the trial court made clear that the settlement made to the estate was intended for the beneficiaries under § 16-62-102. *Mid-South Adjustment Co. v. Estate of Harris*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 551 (June 30, 2004).

Assignment of Tort Claim.

The survival provided by this section

does not confer the power of assignment upon the holder of an unliquidated tort claim for personal injuries. *Southern Farm Bureau Cas. Ins. Co. v. Wright Oil Co.*, 248 Ark. 803, 454 S.W.2d 69 (1970).

Breach of Contract.

A decedent's personal representatives could bring a breach of contract action against an attorney who allegedly failed to draft the decedent's will in accord with the decedent's desires. *McDonald v. Pettus*, 337 Ark. 265, 988 S.W.2d 9 (1999).

Civil Rights.

The Arkansas law of survival is not inconsistent with federal civil rights laws. *Parkerson v. Carrouth*, 782 F.2d 1449 (8th Cir. 1986).

The Arkansas survivorship statute does allow survival of a civil rights action. *Oliver v. United States Army*, 758 F. Supp. 484 (E.D. Ark. 1990).

Contributory Negligence of Distributee.

Where an infant was killed through the wrongful act of the defendant, his administrator was entitled to recover damages for his conscious suffering between the time of his injury and his death and it is no defense that the decedent's father who as the sole distributee of the estate was entitled to receive the same was guilty of negligence which contributed to his injury and death. *Nashville Lumber Co. v. Busbee*, 100 Ark. 76, 139 S.W. 301 (1911).

Corporations.

Where a corporation has a cause of action against another, the action does not survive but dies when the plaintiff corporation goes out of existence. *Arkansas Life Ins. Co. v. American Nat'l Ins. Co.*, 110 Ark. 130, 161 S.W. 136 (1913).

Death of Party.

An action is not abated by the death of a party after the cause of action has been merged in a final judgment and while the judgment stands, even though the judgment is based on a cause of action which would not survive the death of a party before judgment. *Brundrett v. Hargrove*, 204 Ark. 258, 161 S.W.2d 762 (1942).

Under this section an action for violation of civil rights would survive upon the death of the defendant. *Pritchard v. Smith*, 289 F.2d 153 (8th Cir. 1961).

At common law, all actions for tort died

with the tortfeasor. That rule is still in effect in this state, except this section has removed that bar as to tortious injury to the person, and provides that such actions survive the death of the tortfeasor and may be brought against his estate or personal representative; however, it does not authorize such actions to be maintained against the heirs of a deceased person. *Westridge v. Byrd*, 37 Ark. App. 72, 823 S.W.2d 930 (1992).

Evidence.

Evidence that explosion and fire at service station resulting in fatal injuries to decedent could have been caused by negligence of defendants in designing of store-room and equipment therein was sufficient for jury to have awarded damages for wrongful death. *Marshall v. Humble Oil & Ref. Co.*, 459 F.2d 355 (8th Cir. 1972).

The jury was entitled to draw inferences from known physical phenomena incorporated in the testimony of the plaintiffs' expert witness and from the circumstantial evidence in the case. *Marshall v. Humble Oil & Ref. Co.*, 459 F.2d 355 (8th Cir. 1972).

Legal Malpractice.

A decedent's personal representatives could not bring a legal malpractice action against the attorney who drafted the decedent's will since there was no pre-death injury arising from the attorney's alleged malpractice. *McDonald v. Pettus*, 337 Ark. 265, 988 S.W.2d 9 (1999).

Libel, Slander, etc.

An action for slander abates with the death of either party. *Miller v. Nuckolls*, 76 Ark. 485, 89 S.W. 88 (1905).

Action brought by doctor against pharmacist and pharmacy stating claims for libel, slander, malicious prosecution and intentional injury to plaintiff's medical practice, arising out of an unsuccessful criminal prosecution charging plaintiff with illegal distribution of scheduled drugs, did not survive plaintiff's death. *Parkerson v. Carrouth*, 782 F.2d 1449 (8th Cir. 1986).

Limitation of Actions.

Action may be brought within three years from date of killing under this section notwithstanding the limitation provided in wrongful death statute. *Saint*

Louis, I.M. & S. Ry. v. Robertson, 103 Ark. 361, 146 S.W. 482 (1912).

The right of action for the benefit of the estate of plaintiff's intestate for conscious pain and suffering before death is governed by the three year limitation fixed by § 16-56-105. *Smith v. Missouri P.R.R.*, 175 Ark. 626, 1 S.W.2d 48 (1927).

Where administrator's action against railroad for death of intestate was brought when an action for the benefit of the widow and next of kin was barred by limitations but action for the benefit of the estate was not, it must be presumed that suit was for the benefit of the estate. *Sykes v. Jameson*, 192 Ark. 631, 94 S.W.2d 718 (1936).

Where deceased was injured as a result of alleged negligence of railroad, his cause of action for injuries accrued on the date of injury; where deceased's action was barred by period of limitations, similar action by administratrix was also barred as she occupied the same position as deceased in regards to such action. *Hicks v. Missouri Pac. R.R.*, 181 F. Supp. 648 (W.D. Ark.), appeal dismissed, 285 F.2d 427 (1960).

Actions under this section are governed by general three year statute of limitations, § 16-56-105. *Hicks v. Missouri Pac. R.R.*, 181 F. Supp. 648 (W.D. Ark.), appeal dismissed, 285 F.2d 427 (1960).

When the action brought under this section is against a decedent's estate, it must be brought within the time limit for filing claims against the estate even though the plaintiff is looking not to the assets of the estate but to the decedent's liability insurer for payment of his judgment. *Swan v. Estate of Monette ex rel. Monette*, 265 F. Supp. 362 (W.D. Ark. 1967), *aff'd*, 400 F.2d 274 (8th Cir. 1968).

The three-year limitation on an action for injury resulting from taking a drug manufactured by the defendant began to run when it became apparent that the injury from the drug was permanent. *Schenebeck v. Sterling Drug, Inc.*, 423 F.2d 919 (8th Cir. 1970).

Loss of Services.

A husband's loss of the services and companionship of his wife does not amount to wrongs done to his person or his property within the meaning of this section. *White v. Maddux*, 227 Ark. 163, 296 S.W.2d 679 (1956).

Marital Property.

Wife's claim, that settlement proceeds of a personal injury to her late husband were marital property, held without merit; the funds belonged to his estate, to be distributed pursuant to probate law. *Ellis v. Ellis*, 315 Ark. 475, 868 S.W.2d 83 (1994).

Medical Malpractice.

Survival claims involving death as a result of a medical injury are governed by the Medical Malpractice Act, § 16-114-201 et seq., and not by this chapter. *Pastchol v. St. Paul Fire & Marine Ins. Co.*, 326 Ark. 140, 929 S.W.2d 713 (1996).

Multiple Actions.

Where deceased has died as a result of alleged negligence of defendant, both action for compensation of deceased's injuries and action for wrongful death of deceased should be brought by personal representative of deceased if there is one. *Hicks v. Missouri Pac. R.R.*, 181 F. Supp. 648 (W.D. Ark.), appeal dismissed, 285 F.2d 427 (1960).

Pain and Suffering.

Action for pain and suffering endured by son resulting from drug allegedly administered by adoptive father was held not a suit for wrongful death which would abate on death of wrongdoer, but one of injury resulting in pain and suffering, which survives. *Brown v. Cole*, 198 Ark. 417, 129 S.W.2d 245 (1939).

Parties.

Actions for survivorship and actions for wrongful death are separate and distinct in nature. In a survival action, the administrator asserts the decedent's own cause of action, and only the administrator may bring this cause of action; the wrongful death statute, on the other hand, creates a cause of action in the survivors, and it may be brought by the administrator in their behalf, or by the heirs themselves if there is no administrator. *First Com. Bank v. United States*, 727 F. Supp. 1300 (W.D. Ark. 1990).

Venue.

Action against administrator for negligence of his intestate could be brought in any county where service could be had, and could not be brought in county in which administrator was appointed unless he was served therein. *Baker v. Puckett*, 182 Ark. 265, 31 S.W.2d 286 (1930).

Cited: *Chicago, R.I. & P. Ry. v. Caple*, 207 Ark. 52, 179 S.W.2d 151 (1944); *Lopez v. Waldrum Estate*, 249 Ark. 558, 460 S.W.2d 61 (1970); *Fields v. Huff*, 510 F. Supp. 238 (E.D. Ark. 1981); *Daughhetee v. Shipley*, 282 Ark. 596, 669 S.W.2d 886 (1984); *Lowe v. United States*, 662 F. Supp. 1089 (W.D. Ark. 1987); *Baker v. State Farm Fire & Cas. Co.*, 34 Ark. App. 59, 805 S.W.2d 665 (1991); *McCoy v. Crumby*, 353 Ark. 251, 106 S.W.3d 462 (2003); *Rhuland v. Fahr*, 356 Ark. 382, 155 S.W.3d 2 (2004).

16-62-102. Wrongful death actions — Survival.

(a)(1) Whenever the death of a person or a viable fetus shall be caused by a wrongful act, neglect, or default and the act, neglect, or default is such as would have entitled the party injured to maintain an action and recover damages in respect thereof if death had not ensued, then and in every such case, the person or company or corporation that would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person or the viable fetus injured, and although the death may have been caused under such circumstances as amount in law to a felony.

(2) The cause of action created in this subsection shall survive the death of the person wrongfully causing the death of another and may be brought, maintained, or revived against the personal representatives of the person wrongfully causing the death of another.

(3) No person shall be liable under this subsection when the death of the fetus results from a legal abortion or from the fault of the pregnant woman carrying the fetus.

(b) Every action shall be brought by and in the name of the personal representative of the deceased person. If there is no personal representative, then the action shall be brought by the heirs at law of the deceased person.

(c)(1) Every action authorized by this section shall be commenced within three (3) years after the death of the person alleged to have been wrongfully killed.

(2) If a nonsuit is suffered, the action shall be brought within one (1) year from the date of the nonsuit without regard to the date of the death of the person alleged to have been wrongfully killed.

(d) The beneficiaries of the action created in this section are:

(1) The surviving spouse, children, father, mother, brothers, and sisters of the deceased person;

(2) Persons, regardless of age, standing in loco parentis to the deceased; and

(3) Persons, regardless of age, to whom the deceased stood in loco parentis at any time during the life of the deceased.

(e) No part of any recovery referred to in this section shall be subject to the debts of the deceased or become, in any way, a part of the assets of the estate of the deceased person.

(f)(1) The jury or the court, in cases tried without a jury, may fix such damages as will be fair and just compensation for pecuniary injuries, including a spouse's loss of the services and companionship of a deceased spouse and any mental anguish resulting from the death to the surviving spouse and beneficiaries of the deceased.

(2) When mental anguish is claimed as a measure of damages under this section, mental anguish will include grief normally associated with the loss of a loved one.

(g) The judge of the court in which the claim or cause of action for wrongful death is tried or is submitted for approval of a compromise settlement, by judgment or order and upon the evidence presented during trial or in connection with any submission for approval of a compromise settlement, shall fix the share of each beneficiary, and distribution shall be made accordingly. However, in any action for wrongful death submitted to a jury, the jury shall make the apportionment at the request of any beneficiary or party.

(h) Nothing in this section shall limit or affect the right of circuit courts having jurisdiction to approve or authorize settlement of claims or causes of action for wrongful death, but the circuit courts shall consider the best interests of all the beneficiaries under this section and not merely the best interest of the widow and next of kin as now provided by § 28-49-104.

(i) It is not the responsibility of the personal representative of a deceased person to locate anyone in loco parentis who is not known to the personal representative to be in loco parentis to the deceased person.

History. Acts 1957, No. 255, §§ 1-5; 1981, No. 625, § 1; A.S.A. 1947, §§ 27-906 — 27-910; Acts 1993, No. 589, § 1; 2001, No. 1265, § 1; 2001, No. 1581, §§ 1, 2.

Amendments. The 2001 amendment by No. 1265 inserted “viable fetus” in (a)(1); added (a)(3); and made minor stylistic changes throughout.

The 2001 amendment by No. 1581 redesignated former (d) as present (d)

through (d)(3) and made related changes; inserted “regardless of age” in (d)(2) and (d)(3); added “at any time during the life of the deceased” in (d)(3); and added (i).

Cross References. Right of action in case of death from injuries survives under workers’ compensation laws, Ark. Const., Art. 5, § 32; Amend. 26.

Commencement or revival of actions, § 28-50-102.

RESEARCH REFERENCES

Ark. L. Rev. Negligence — Wrongful Death — Statute of Limitation, 15 Ark. L. Rev. 424.

Torts — Wrongful Death — Death from Prenatal Injuries, 17 Ark. L. Rev. 203.

Arkansas Model Jury Instructions: Wrongful Death, 20 Ark. L. Rev. 73.

Comment, The Arkansas Wrongful Death Statute, 35 Ark. L. Rev. 294.

Case Note, Simmons First National Bank v. Abbott: The Arkansas Wrongful Death Statute, etc., 40 Ark. L. Rev. 421.

Allowing Fetal Wrongful Death Actions in Arkansas: A Death Whose Time Has Come?, 44 Ark. L. Rev. 465.

Recent Developments, 49 Ark. L. Rev. 419.

Wrongful Death Damages Under the Arkansas Medical Malpractice Act: Would a Change Make Cents?, 54 Ark. L. Rev. 577 (2001).

UALR L.J. Legislative Survey, Civil Procedure, 4 UALR L.J. 581.

Arkansas Law Survey, Saunders, Torts, 7 UALR L.J. 259.

Arkansas Law Survey, Looney, Dece-
dents’ Estates, 8 UALR L.J. 139.

Survey — Civil Procedure, 11 UALR L.J. 137.

Survey — Torts, 11 UALR L.J. 261.

Survey, Torts, 13 UALR L.J. 409.

Legislative Survey, Miscellaneous, 16 UALR L.J. 161.

Note, A Viable Fetus is Not a “Person” Under the Arkansas Wrongful Death Statute, 19 UALR L.J. 307.

Torts-Wrongful Death-The Birth of Fetal Rights Under Arkansas’s Wrongful Death Statute: The Arkansas Supreme Court Recognizes a Fetus as a “Person.” Aka v. Jefferson Hospital Ass’n, 344 Ark. 627, 42 S.W.3d 508 (2001), 24 UALR L.J. 359.

Annual Survey of Caselaw, Tort Law, 24 UALR L.J. 1085.

CASE NOTES

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Constitutionality.

This section does not violate Ark. Const., Art. 2, § 13. Peugh v. Oliger, 233 Ark. 281, 345 S.W.2d 610 (1961), overruled on other grounds, Fountain v. Chicago, R.I. & P. Ry., 243 Ark. 947, 422 S.W.2d 870 (1968), overruled on other

grounds, *Fountain v. Chicago, R.I. & Pac. Ry.*, 243 Ark. 947, 422 S.W.2d 878 (1968).

Construction.

An historical distinction has been built into the wrongful death legislation between the proceeding to determine the apportionment of the award and the proceeding to determine the liability and computation of damages recoverable from the tortfeasor, which distinction is preserved in the scheme of this section; the issue of fixing the amount of damages is dealt with in subsection (f) and the issue of fixing the shares of the statutory beneficiaries in that award is dealt with in subsection (g). *Bell v. Estate of Bell*, 318 Ark. 483, 885 S.W.2d 877 (1994).

If the defendant is deceased, the three-year limit on wrongful death actions provided by subdivision (c)(1) of this section may be shortened by § 28-50-101(a). *Callaghan v. Coberly*, 927 F. Supp. 332 (W.D. Ark. 1996).

A wrongful-death action brought by a plaintiff in his individual capacity pursuant to this section involves neither the same action nor the same plaintiff as a survival action brought by the plaintiff in his representative capacity on behalf of the decedent's estate pursuant to § 16-62-101. *Murrell v. Springdale Mem. Hosp.*, 330 Ark. 121, 952 S.W.2d 153 (1997).

Two-year limitations period of Medical Malpractice Act, § 16-114-201 et seq., conflicts with the three-year limitations period provided under subsection (c) of this section and is therefore controlling where death ensues from medical injuries. *Davis v. Parham*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 300 (May 12, 2005).

Applicability.

Where the alleged cause of the decedent's death was a medical injury, the two-year statute of limitations provided by § 16-114-203, rather than the three-year statute of limitations in this section, is applicable. *Morrison v. Jennings*, 328 Ark. 278, 943 S.W.2d 559 (1997).

Admiralty.

The right of action given by former, similar section may be enforced in admiralty. *Monongahela River Consol. Coal & Coke Co. v. Schinnerer*, 196 F. 375 (6th Cir.), cert. denied, 226 U.S. 608, 33 S. Ct. 113, 57 L. Ed. 380 (1912) (decision under prior law).

Apportionment.

The factors set forth in subsection (f) of this section also guide the probate court's determination of the apportionment of the settlement proceeds under subsection (g), in those cases where the damages issue was not tried. *Bell v. Estate of Bell*, 318 Ark. 483, 885 S.W.2d 877 (1994).

The evidence supported the probate court's apportionment order, where the probate court's 50/50 apportionment of the remaining proceeds between appellant and the minors roughly approximated the apportionment of their economic losses (52% to appellant and 48% to the minors), and the court clearly considered both this evidence and the compensable elements enumerated in this section. *Bell v. Estate of Bell*, 318 Ark. 483, 885 S.W.2d 877 (1994).

In an action arising from a fatal motor vehicle collision which resulted in an award of damages apportioned by the jury among family members of the decedent, two awards were reversed where the recipients did not testify at trial and no other witnesses presented evidence of mental anguish on the part of either of them. *New Prospect Drilling Co. v. First Com. Trust*, 332 Ark. 466, 966 S.W.2d 233 (1998).

Under subsections (g) and (h), it was clear that the probate court had the authority to approve a wrongful death settlement and also to apportion and distribute the proceeds. *Douglas v. Holbert*, 335 Ark. 305, 983 S.W.2d 392 (1998).

Attorneys' Fees.

A beneficiary's attorney is not entitled to fees on a portion of wrongful death proceeds attributable to the beneficiary, and a probate court has no jurisdiction to award attorneys' fees for services rendered to an individual beneficiary. *Brewer v. Lacefield*, 301 Ark. 358, 784 S.W.2d 156 (1990).

Beneficiaries.

An action for the benefit of the estate and one for the widow may be joined. *Tillar v. Reynolds*, 96 Ark. 358, 131 S.W. 969 (1910); *Southern Anthracite Coal Co. v. Hodge*, 99 Ark. 302, 139 S.W. 292 (1911) (preceding decisions under prior law).

The administrator may recover for the conscious suffering of a deceased infant, and it is no defense, that the father, being

sole distributee, was guilty of contributory negligence. *Nashville Lumber Co. v. Busbee*, 100 Ark. 76, 139 S.W. 301 (1911) (decision under prior law).

The administrator of a deceased minor is entitled to recover all damages for a wrongful death, both for the benefit of his estate and the next of kin. *Southwestern Gas & Elec. Co. v. Godfrey*, 178 Ark. 103, 10 S.W.2d 894 (1928) (decision under prior law).

Where widow received payment of judgment for her husband's death for the benefit of herself and next of kin, widow was entitled to only one-third of the amount received and she held the balance in trust for her children; the adult children being entitled to their share on demand. *Mosely v. Beard*, 203 Ark. 731, 158 S.W.2d 917 (1942) (decision under prior law).

Where grandparents stood in loco parentis to their nine-year-old grandson, an award for mental anguish because of the death of the grandson was not improper. *Bockman v. Butler*, 226 Ark. 159, 288 S.W.2d 597 (1956) (decision under prior law).

Any recovery in action by administrator for wrongful death of deceased would be for the benefit of deceased's next of kin. *Hicks v. Missouri Pac. R.R.*, 181 F. Supp. 648 (W.D. Ark.), appeal dismissed, 285 F.2d 427 (1960).

Damages recovered do not become a part of the general assets of the estate and are not subject to debts of the estate but are recovered in trust for the beneficiaries named herein. *Dukes v. Dukes*, 233 Ark. 850, 349 S.W.2d 339 (1961).

A step-daughter was one to whom the deceased stood in loco parentis within the meaning of this section. *Moon Distribs., Inc. v. White*, 245 Ark. 627, 434 S.W.2d 56 (1968).

Section 9-9-215 specifically says that, in construing statutes, the court shall recognize that there is no legal relationship existing between an natural parent whose child has been adopted by another; the child of a natural father adopted by another, was not one of the beneficiaries which this section authorized to recover for the wrongful death of the decedent. *Webb v. Harvell*, 563 F. Supp. 172 (W.D. Ark. 1983).

Whether a decedent stood in the position of in loco parentis to a person is to be determined by the intent of the parties.

Standridge v. Standridge, 304 Ark. 364, 803 S.W.2d 496 (1991).

The fact that step-son lived with his mother and decedent for a little over 15 months was not enough to establish that decedent had formed the intent to assume the duties and benefits of becoming step-son's father. *Standridge v. Standridge*, 304 Ark. 364, 803 S.W.2d 496 (1991).

A step-son was not one to whom the deceased stood in loco parentis within the meaning of this section where nothing in the record indicated that the deceased had formed the intent to assume the duties and benefits of becoming step-son's father. *Standridge v. Standridge*, 304 Ark. 364, 803 S.W.2d 496 (1991).

Where defendant's sole claim to the proceeds of wrongful death award was as decedent's surviving spouse, and where because of the invalidity of her marriage to decedent, she was not his surviving spouse, she thus could not share in the proceeds of the settlement. *Standridge v. Standridge*, 304 Ark. 364, 803 S.W.2d 496 (1991).

Under the Arkansas wrongful death statute, a corporation cannot recover for the loss of an employee's services because a decedent's employer is not an enumerated beneficiary. *Lusby v. Union Pac. R.R.*, 4 F.3d 639 (8th Cir. 1993).

Children who are not living at the time of the deceased person's death are not among the statutory beneficiaries, and neither are the deceased children's heirs at law, therefore, the definition of "children" as used in subsection (d) of this section does not include the descendants of those children of the deceased who predeceased the deceased. *Babb v. Matlock*, 340 Ark. 263, 9 S.W.3d 508 (2000).

Collateral Source Rule.

Although the collateral source rule was held not applicable to a proceeding for distribution of settlement funds, it still applies in the context of a proceeding to determine the liability and damages recoverable from the wrongdoer. *Bell v. Estate of Bell*, 318 Ark. 483, 885 S.W.2d 877 (1994).

Where the amount of damages was reached by compromise agreement and was finalized prior to the commencement of the apportionment proceeding, subsection (f) did not apply. *Bell v. Estate of Bell*, 318 Ark. 483, 885 S.W.2d 877 (1994).

Complaint.

If the complaint fails to show that there is no administrator, the defect may be supplied by proof. *Saint Louis, I.M. & S. Ry. v. Hutchinson*, 101 Ark. 424, 142 S.W. 527 (1912) (decision under prior law).

Dismissal of wrongful death action was proper where personal representatives of estate filed complaint *pro se*, which constituted the unauthorized practice of law rendering the complaint a nullity, and where the two-year statute of limitations had expired. *Davenport v. Lee*, 348 Ark. 148, 72 S.W.3d 85 (2002).

Widower failed to meet the requirements of subsection (b) of this section because he had not been appointed executor at the time he originally filed the complaint; therefore, he lacked standing to pursue the action, the original complaint was a nullity, and the subsequent appointment of the widower as executor did not relate back to the filing of the original complaint. *McKibben v. Mullis*, 79 Ark. App. 382, 90 S.W.3d 442 (2002).

Conflict of Laws.

The fact that the laws of distribution in this state and those of the state where the death occurred are different is no defense to an action brought in this state. *Midland Valley R.R. v. Lemoyne*, 104 Ark. 327, 148 S.W. 654 (1912) (decision under prior law).

Damages.

The loss to minor children of the instruction and the physical, moral, and intellectual training by a parent is an element to be considered in estimating damages to children by reason of parents' wrongful death, and each child is entitled to recover the amount of pecuniary loss sustained by the child. *Saint Louis, I.M. & S. Ry. v. Prince*, 101 Ark. 315, 142 S.W. 499 (1911) (decision under prior law).

Where the wrongful act of another deprives the husband of the services or companionship of his wife, he is entitled to compensation therefor. *Graysonia-Nashville Lumber Co. v. Carroll*, 102 Ark. 460, 144 S.W. 519 (1912) (decision under prior law).

The widow and children of one negligently killed are not entitled to damages for his pain and suffering but only to damages for the loss of his comfort and support. *Hines v. Betts*, 146 Ark. 555, 226 S.W. 165 (1920); *Webb v. Waters*, 154 Ark.

547, 243 S.W. 846 (1922) (preceding decisions under prior law).

In an action by a parent for the negligent killing of a child, the damages awarded must be founded on pecuniary loss, actual or expected, and mere injury to feelings cannot be considered. *Interurban Ry. v. Trainer*, 150 Ark. 19, 233 S.W. 816 (1921) (decision under prior law).

Parents sought damages for the death of their adult son and it was held that contributions by the son to the father were admissible in evidence without proof of financial dependency. *Washburn v. Douthit*, 73 F.2d 23 (8th Cir. 1934) (decision under prior law).

Instruction authorizing recovery of damages by a parent for death of child in such sum as he would have contributed to his parents after reaching majority was held erroneous. *Davis v. Gillin*, 188 Ark. 523, 66 S.W.2d 1057 (1934) (decision under prior law).

In death action by administrator, instruction as to measure of damages should have distinguished between cause of action for the benefit of widow and next of kin for pecuniary loss to them and cause of action to the estate for damages suffered by the deceased prior to his death. *Cleft v. Jordan*, 205 Ark. 245, 168 S.W.2d 403 (1943) (decision under prior law).

In action to recover for death of plaintiff's husband, instruction authorizing jury to include in their verdict, as an element of damages, loss of consortium and companionship amounted to an erroneous declaration as to measure of damages, but, when raised for first time in the motion for new trial, cannot be considered on appeal. *Missouri P.R.R. v. Gilbert*, 206 Ark. 683, 178 S.W.2d 73 (1944) (decision under prior law).

To prove loss of future earnings due to impairment of earning power of the deceased at the time of the accident and death, evidence as to prior earnings is not necessarily confined to the immediate time prior to the accident. *Missouri P.R.R. v. Gilbert*, 206 Ark. 683, 178 S.W.2d 73 (1944) (decision under prior law).

Recovery for benefit of children should be limited to the present worth of sums which would be contributed by the parent prior to their majority. *Missouri P.R.R. v. Gilbert*, 206 Ark. 683, 178 S.W.2d 73 (1944) (decision under prior law).

The pecuniary value of the loss of future

earnings of the deceased is a factor to be considered in determining the loss of the financial aid to the widow and children. *Missouri P.R.R. v. Gilbert*, 206 Ark. 683, 178 S.W.2d 73 (1944) (decision under prior law).

Temporary employment, and the higher wages paid thereon, considered alone, would not be a proper test to furnish a fair and general measure of his earning capacity. *Missouri P.R.R. v. Gilbert*, 206 Ark. 683, 178 S.W.2d 73 (1944) (decision under prior law).

In estimating damage resulting from loss or impairment of earning capacity, the reasonable and dependable probabilities, looking through all that may happen and for all the year for which the computation is to be made, and viewed according to the general experiences and observations of life, are the elements which are to guide to a fair and acceptable result. *Missouri P.R.R. v. Gilbert*, 206 Ark. 683, 178 S.W.2d 73 (1944) (decision under prior law).

There is nothing in this section which limits a child's recovery for pecuniary loss, arising from the wrongful death of a parent, to the period of his minority. *Strahan v. Webb*, 231 Ark. 426, 330 S.W.2d 291 (1959).

Since the right to recover damages for pecuniary loss beyond the minority of the beneficiaries depends upon the circumstances, where it is clear that deceased would have contributed to the education of his two sons even after they had attained their majority, the sons are entitled to damages for pecuniary loss beyond their minority. *Strahan v. Webb*, 231 Ark. 426, 330 S.W.2d 291 (1959).

The term "pecuniary injuries" as used in this section is not limited to the present value of the financial support that a child would receive from his mother during his minority, but includes also compensation for the loss of parental love, care, supervision, and training. *Bridges v. Stephens*, 238 Ark. 801, 384 S.W.2d 490 (1964).

Award for the death of the mother of an illegitimate child dependent upon the mother not only for pecuniary support, but also for the loving care that a child ordinarily receives from both parents, found not excessive. *Bridges v. Stephens*, 238 Ark. 801, 384 S.W.2d 490 (1964).

This section does not limit the recovery of one to whom the deceased stood in loco

parentis to damages for mental anguish to the exclusion of damages for pecuniary loss. *Moon Distribs., Inc. v. White*, 245 Ark. 627, 434 S.W.2d 56 (1968).

Since this section limits the class of beneficiaries who can recover compensatory damages for pecuniary loss to the surviving spouse and next of kin of the deceased, and the relationship of brother to the deceased was not analogous to next of kin; instruction that permitted jury to compensate brother for such pecuniary loss was error. *Vickers v. Gifford-Hill & Co.*, 534 F.2d 1311 (8th Cir. 1976).

Where the adult sons were financially independent, and the decedent had no legal obligation to support the adult sons, and where the sons had not truly demonstrated that they suffered greater than normal grief due to the loss of their father, the court correctly directed a verdict in favor of defendants. *Dobson v. Bacon Transp. Co.*, 607 F.2d 805 (8th Cir. 1979).

Where the testimony of the surviving husband of a woman killed in an automobile accident concerning his mental anguish was sufficient in itself to support the amount which the probate court apportioned to him, the award for mental anguish was proper, even though the court awarded the husband one-third of the wrongful death action recovery and referred to a "curtesy amount" since the evidence showed that the court did not determine his share arbitrarily and without reference to the evidence. *Dale v. Sutton*, 273 Ark. 396, 620 S.W.2d 293 (1981).

Evidence sufficient to justify an award of punitive damages. *Brown v. Missouri Pac. R.R.*, 543 F. Supp. 348 (W.D. Ark. 1982), *aff'd*, 703 F.2d 1050 (8th Cir. 1983).

The laws of this state do not preclude the allowance of punitive damages in a wrongful death action, at least where the award of punitive damages is simply an incident of the action for personal injuries that the decedent would have had if he had lived. *Brown v. Missouri Pac. R.R.*, 703 F.2d 1050 (8th Cir. 1983).

For discussion of amount of damages to be awarded for compensatory damages, pecuniary injuries, mental anguish, conscious pain and suffering, loss of services and loss of consortium to survivors of victims of an explosion, see *Lowe v. United States*, 662 F. Supp. 1089 (W.D. Ark. 1987).

Finding in favor of the spouse that a

pharmacist incorrectly filled the decedent's prescription resulting in his death was proper and an award of \$125,000 to the decedent's daughter for mental anguish was acceptable because subdivision (f)(2) of this section included grief normally associated with the loss of a loved one. *Wal-Mart Stores, Inc. v. Tucker*, 353 Ark. 730, 120 S.W.3d 61 (2003).

Jurisdiction.

The probate court does not have jurisdiction to resolve the paternity of a child in order to determine whether the child can share in the proceeds of a wrongful death settlement. *Rager v. Turley*, 342 Ark. 223, 27 S.W.3d 729 (2000).

Denial of doctor's petition seeking a writ of prohibition to prevent circuit court from proceeding with a wrongful-death action was proper where the circuit court was not wholly without jurisdiction; furthermore, the court could not treat the petition as one for certiorari because the case simply did not present a situation where the remedy by appeal was inadequate. *Conner v. Simes*, 355 Ark. 422, 139 S.W.3d 476 (2003).

—Mental Anguish.

Mental anguish, to warrant recovery of damages therefore, must be real and with cause and must have resulted proximately and naturally from conduct or event which gives rise to the right of recovery, and an award must be reasonable in light of all relevant factors disclosed by the evidence. *Beaty v. Buckeye Fabric Finishing Co.*, 179 F. Supp. 688 (E.D. Ark. 1959).

The principles laid down by the Supreme Court in the cases decided under § 23-17-112(a) are applicable to mental anguish claims arising under this section. *Beaty v. Buckeye Fabric Finishing Co.*, 179 F. Supp. 688 (E.D. Ark. 1959).

Award to children was reasonable compensation for mental anguish suffered by them because of wrongful death of father. *Beaty v. Buckeye Fabric Finishing Co.*, 179 F. Supp. 688 (E.D. Ark. 1959).

It was the intention of the legislature to allow recovery for mental anguish under this section. *Peugh v. Oliger*, 233 Ark. 281, 345 S.W.2d 610 (1961), overruled on other grounds, *Fountain v. Chicago, R.I. & P. Ry.*, 243 Ark. 947, 422 S.W.2d 870 (1968).

In order to recover for mental anguish under this section, one must suffer more

than normal grief. *Peugh v. Oliger*, 233 Ark. 281, 345 S.W.2d 610 (1961), overruled on other grounds, *Fountain v. Chicago, R.I. & P. Ry.*, 243 Ark. 947, 422 S.W.2d 870 (1968); *Fountain v. Chicago, R.I. & Pac. Ry.*, 243 Ark. 947, 422 S.W.2d 878 (1968).

A verdict for mental anguish suffered by parents because of death of their daughter was not so grossly excessive as to shock conscience of court. *Tiner v. Tiner*, 238 Ark. 222, 379 S.W.2d 425 (1964).

Where the decedent was survived by his mother and several brothers and sisters, the brothers and sisters could recover for mental anguish caused by the wrongful death even though they were not heirs at law. *Fountain v. Chicago, R.I. & Pac. Ry.*, 243 Ark. 947, 422 S.W.2d 878 (1968).

In wrongful death action, factors to be considered in evaluating mental anguish are the duration and intensity of the sorrow and grief, the attitude of the decedent toward the survivor, the attitude of the survivor toward the decedent, the duration and intimacy of the relationship, and ties of affection between decedent and survivor, and the violence and suddenness of the death. *Saint Louis S.W. Ry. v. Pennington*, 261 Ark. 650, 553 S.W.2d 436 (1977).

Mental anguish in wrongful death actions will vary in every case according to the nervous temperament of the individual, his ability to withstand shock, sex, circumstances, and position in life. *Saint Louis S.W. Ry. v. Pennington*, 261 Ark. 650, 553 S.W.2d 436 (1977).

Among the circumstances to be considered in determining the extent and compensability of mental anguish are the closeness of the relationship of the survivors with the deceased, the probable life expectancy of the deceased and survivors, the nature of the death, and the physical and mental impact on the survivors. *Dugal v. Commercial Std. Ins. Co.*, 456 F. Supp. 290 (W.D. Ark. 1978).

Damages under this section may include compensation for mental anguish occasioned by a death, provided that the survivors suffer more than normal grief. *Dugal v. Commercial Std. Ins. Co.*, 456 F. Supp. 290 (W.D. Ark. 1978).

The legislature vested the cause of action for damages for mental anguish in the personal representative, but with the recovery apportionable among the indi-

vidual beneficiaries, so that all claims arising from a wrongful death can be asserted and settled in one suit and there was no reason to recognize a duplicate cause of action in the decedent's mother as an individual. *Waldrip v. McGarity*, 270 Ark. 305, 605 S.W.2d 5 (1980).

The award to each beneficiary for mental anguish for wrongful death is to be determined on an individual basis. *Dale v. Sutton*, 273 Ark. 396, 620 S.W.2d 293 (1981).

Evidence was sufficient in itself to support the amount which the probate court apportioned to him; award for mental anguish was proper, even though the court awarded the husband one-third of the wrongful death action recovery and referred to a "curtesy amount," since the evidence showed that the court did not determine his share arbitrarily and without reference to the evidence. *Dale v. Sutton*, 273 Ark. 396, 620 S.W.2d 293 (1981).

The proximity of relationship between the deceased and the survivors is the most significant factor in determining whether recovery for mental anguish is allowable; distant relatives generally have no more than normal grief and will not be allowed to recover without establishing something more. *Martin v. Rieger*, 289 Ark. 292, 711 S.W.2d 776 (1986).

The suddenness and violent nature of the death is not sufficient, standing alone, to support an award of damages for mental anguish. Mental anguish must be real and with cause and be more than the normal grief occasioned by the loss of a loved one. *Lowe v. United States*, 662 F. Supp. 1089 (W.D. Ark. 1987).

Factors utilized in evaluating awards for mental anguish in wrongful death cases are: (1) the duration and intimacy of their relationship and the ties of affection between the decedent and the survivor; (2) frequency of association and communication between an adult survivor and an adult decedent; (3) the attitude of the decedent toward the survivor and of the survivor toward the decedent; (4) the duration and intensity of the sorrow; (5) maturity or immaturity of the survivor; (6) the violence or suddenness of the death; (7) sleeplessness or troubled sleep over an extended period; (8) obvious extreme or unusual nervous reaction to the death; (9) crying spells over an extended period of time; (10) adverse effect on sur-

vivor's work or school; (11) change of personality of the survivor; (12) loss of weight by survivor or other physical symptoms; and (13) age and life expectancy of the decedent. *Lowe v. United States*, 662 F. Supp. 1089 (W.D. Ark. 1987).

—Punitive Damages.

The estate and children of decedent could recover punitive damages in wrongful death action brought under this section since Arkansas courts have allowed punitive damages where the action is grounded in the wrongful death or survival statutes. *Fields v. Huff*, 510 F. Supp. 238 (E.D. Ark. 1981).

Punitive damages are recoverable in wrongful death actions. The surviving beneficiaries of the decedent, killed as a result of willful and wanton tortious conduct, are entitled to recover those punitive damages the decedent would have recovered had he or she lived. *Vickery v. Ballentine*, 293 Ark. 54, 732 S.W.2d 160 (1987).

The purpose of punitive damages is not to compensate the injured party but to impose a monetary penalty on the defendant and to discourage others from similar behavior. That purpose is unquestionably the same whether the injured person lives or dies as a result of defendant's willful or wanton conduct. *Vickery v. Ballentine*, 293 Ark. 54, 732 S.W.2d 160 (1987).

Medical Malpractice.

The limitations period provided under § 16-114-203 conflicts with the limitations period provided under this section; pursuant to the Medical Malpractice Act, § 16-114-201 et seq., this section's statute of limitations, as an inconsistent provision of law, is superseded by § 16-114-203 where the two conflict. *Hertlein v. St. Paul Fire & Marine Ins. Co.*, 323 Ark. 283, 914 S.W.2d 303 (1996).

Any medical injury, even one resulting in death, is governed by the medical malpractice statute of limitations, § 16-114-203, and not by this section. *Pastchol v. St. Paul Fire & Marine Ins. Co.*, 326 Ark. 140, 929 S.W.2d 713 (1996).

By passing the Medical Malpractice Act, § 16-114-201 et seq., the Arkansas General Assembly did not repeal this section in cases where the death was caused by a medical injury. *Meredith v. Buchman*, 101 F. Supp. 2d 764 (W.D. Ark. 2000).

Parties.

It is no defense that the widow has remarried since the killing. *Saint Louis, I.M. & S. Ry. v. Cleere*, 76 Ark. 377, 88 S.W. 995 (1905) (decision under prior law).

In an action for the killing of a child, the surviving father being the next of kin and the parent in whose behalf recovery may be had, it was error to instruct the jury that the mother might recover for the loss of the child's services. *Hines v. Johnson*, 145 Ark. 592, 224 S.W. 989 (1920) (decision under prior law).

Where a widow brought suit for the wrongful death of her husband in her name for the benefit of herself and their minor child and judgment was rendered for the widow and no question was raised in the trial court as to the proper parties plaintiff, it could not be raised for the first time on appeal. *Reynolds v. Nutt*, 217 Ark. 543, 230 S.W.2d 949 (1950) (decision under prior law).

Where wrongful death action was brought in the respective names of the parents of deceased minors when the parents were administrators of the respective estates of the sons, defendants were not prejudiced by the action of the court in denying their motion to dismiss the complaint and permitting the plaintiffs to amend their complaint by interlineation, substituting the proper parties plaintiff. *J. Paul Smith Co. v. Tipton*, 237 Ark. 486, 374 S.W.2d 176 (1964).

Actions for survivorship and actions for wrongful death are separate and distinct in nature. In a survival action, the administrator asserts the decedent's own cause of action, and only the administrator may bring this cause of action; the wrongful death statute, on the other hand, creates a cause of action in the survivors, and it may be brought by the administrator in their behalf, or by the heirs themselves if there is no administrator. *First Com. Bank v. United States*, 727 F. Supp. 1300 (W.D. Ark. 1990).

In Arkansas, a wrongful-death action must be brought by and in the name of the personal representative of the deceased person, and if there is no personal representative of the deceased person, then a wrongful-death action must be brought by all the heirs at law; an action brought by less than all the heirs of the deceased is a nullity. *Sanderson v. McCollum*, 82 Ark. App. 111, 112 S.W.3d 363 (2003).

Survival and wrongful death action was properly dismissed because subsection (b) of this section requires that the suit be filed by the personal representative or all of the heirs of the decedent, and the Arkansas Supreme Court has held that this language is clear and unambiguous; because the wrongful-death action is a creation of statute and exists only in the manner and form prescribed by statute, an action brought by less than all of the heirs of the deceased is a nullity. *Estate of Mona L. Hernandez v. Clark*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 481 (June 23, 2004).

Term "heirs at law" as used in subsection (b) of this section means "beneficiaries" as used in subsection (d), and a motion to dismiss a wrongful death action was properly granted where two sisters were not named as parties; the doctrine of relation back under Ark. R. Civ. P. 15 did not help because the original complaint was a nullity. *Brewer v. Poole*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 239 (Apr. 21, 2005).

—Heirs.

The mother is not an heir entitled to sue, although the deceased contributed to her support in his lifetime. *Kansas City S. Ry. v. Frost*, 93 Ark. 183, 124 S.W. 748 (1909) (decision under prior law).

A boy whose parents were killed in a railroad crossing collision, leaving him the only heir and next of kin of both parents, may recover for the mother's death. *St. Louis-San Francisco Ry. v. Oxford*, 174 Ark. 966, 298 S.W. 207 (1927) (decision under prior law).

Failure to appoint a personal representative has no bearing in a wrongful death action as the "heirs at law" can sue in their own right. *Maryland Cas. Co. v. Rowe*, 256 Ark. 221, 506 S.W.2d 569 (1974).

The statute authorizing heirs to maintain suit on behalf of a decedent is this section, and it applies only to wrongful death situations. *Daughetee v. Shipley*, 282 Ark. 596, 669 S.W.2d 886 (1984).

Where a wrongful death action is pursued by heirs at law, all heirs at law must be joined in the action; where there are multiple heirs at law, a single heir at law lacks standing under this section, thus depriving the circuit court of jurisdiction. *Ramirez v. White County Circuit Court*, 343 Ark. 372, 38 S.W.3d 298 (2001).

Since family did not name decedent's siblings as plaintiffs in a lawsuit against defendants for medical malpractice where probate had not been opened, the complaint was a nullity and summary judgment in favor of defendants was proper; siblings were not named as plaintiffs until after statute of limitations in § 16-114-203 expired. *Rice v. Tanner*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 417 (June 23, 2005).

—In Loco Parentis.

Where there was no evidence that the two adult grandchildren, who suffered no disability, were relying on their mother's support at the time of her death, they were not beneficiaries under the wrongful-death statute and were not entitled to take as heirs at law of their mother, because she did not stand in loco parentis to them at the time of her death. *Babb v. Matlock*, 340 Ark. 263, 9 S.W.3d 508 (2000).

—Joinder.

Where there is no personal representative, the action may be brought by the widow and heirs, but if all parties do not join, the error is waived unless raised in trial court. *Saint Louis, I.M. & S. Ry. v. Watson*, 97 Ark. 560, 134 S.W. 949 (1911). See also *Saint Louis, I.M. & S. Ry. v. Corman*, 92 Ark. 102, 122 S.W. 116 (1909) (preceding decisions under prior law).

It was an indispensable prerequisite to the maintenance of a suit under former section that widow and heirs be joined. *Thompson v. Southern Lumber Co.*, 113 Ark. 380, 168 S.W. 1068 (1914) (decision under prior law).

An administratrix suing for the wrongful death of a foreign bus company's ticket agent who was injured while helping to load a passenger's truck on one of the company's vehicles was entitled to maintain a joint action against the company, the bus driver, and the Arkansas citizens who allegedly caused the death. *Harrelson v. Missouri Pac. Transp. Co.*, 87 F.2d 176 (8th Cir. 1936) (decision under prior law).

—Personal Representatives.

The father cannot maintain the action where there is a personal representative. *Saint Louis, M. & S.E.R.R. v. Garner*, 76 Ark. 555, 89 S.W. 550 (1905) (decision under prior law).

A foreign administrator may maintain the action. *Saint Louis S.W. Ry. v. Graham*, 83 Ark. 61, 102 S.W. 700 (1907); *Midland Valley R.R. v. Lemoyne*, 104 Ark. 327, 148 S.W. 654 (1912) (preceding decisions under prior law).

A wife's administrator may sue her husband for tort resulting in her death. *Fitzpatrick v. Owens*, 124 Ark. 167, 186 S.W. 832 (1916) (decision under prior law).

The administrator of a deceased employee may recover for his death against his employer for the benefit of everybody concerned, including the next of kin. *Ashcraft v. Jerome Hardwood Lumber Co.*, 173 Ark. 135, 292 S.W. 386 (1927) (decision under prior law).

Deceased's mother as his administratrix could maintain an action for damages for his wrongful death. *St. Louis-San Francisco Ry. v. Crick*, 182 Ark. 312, 32 S.W.2d 815 (1930) (decision under prior law).

A death action based on the Employer's Liability Act, §§ 11-8-101 — 11-8-108, for the benefit of the deceased employee's widow and heirs against a corporation not engaged in interstate commerce must be instituted by the personal representative of such employee and not by his widow and heirs. *Dicken v. Missouri P.R.R.*, 188 Ark. 1035, 69 S.W.2d 277 (1934) (decision under prior law).

When a personal representative is appointed, the personal representative is the only person who can maintain a suit for damages for wrongful death. *Reed v. Blevins*, 222 Ark. 202, 258 S.W.2d 564 (1953), cert. denied, 347 U.S. 937, 74 S. Ct. 632, 98 L. Ed. 1087 (1954) (decision under prior law).

Personal representative in bringing suit for wrongful death acts only as a trustee of conduit and may not go beyond that status. *Dukes v. Dukes*, 233 Ark. 850, 349 S.W.2d 339 (1961).

Where personal representative is appointed, personal representative is the only person who can maintain suit for wrongful death. *Dukes v. Dukes*, 233 Ark. 850, 349 S.W.2d 339 (1961); *Dawson v. Gerritsen*, 295 Ark. 206, 748 S.W.2d 33 (1988).

Where deceased has died as a result of alleged negligence of defendant, both action for compensation of deceased's injuries and action for wrongful death of deceased should be brought by personal

representative of deceased if there is one. *Hicks v. Missouri Pac. R.R.*, 181 F. Supp. 648 (W.D. Ark.), appeal dismissed, 285 F.2d 427 (1960).

While the widow and daughter of deceased are beneficiaries of any wrongful death recovery, there is no case law or statute giving them standing as parties to the action. Therefore it was not they, but the administrator, whose duty and right it was to pursue the action, subject to the probate court's approval, and to choose counsel for that purpose. *Cude v. Cude*, 286 Ark. 383, 691 S.W.2d 866 (1985); *Brewer v. Lacefield*, 301 Ark. 358, 784 S.W.2d 156 (1990).

The personal representative, in bringing suit for wrongful death, acts only as a trustee of conduit, and any proceeds recovered are for the benefit of the beneficiaries and not for the estate. *Brewer v. Lacefield*, 301 Ark. 358, 784 S.W.2d 156 (1990).

Beneficiaries may prefer to have independent counsel to protect their interests in a wrongful death suit, but as long as the code provides that the personal representative is the party to bring the action, that party has the absolute right to choose counsel for that purpose. Should the personal representative or chosen council fail to provide adequate representation, application can be made to the probate court to either not approve or disallow the contracts entered into by the representative, and a representative can be removed pursuant to § 28-48-105 if the court finds him unsuitable. *Brewer v. Lacefield*, 301 Ark. 358, 784 S.W.2d 156 (1990).

Every wrongful death action shall be brought by the personal representative of the deceased person, if there is a personal representative. *McGuire v. Smith*, 58 Ark. App. 68, 946 S.W.2d 717 (1997).

A personal representative of the estate may file a wrongful death action on behalf of the statutory beneficiaries. *Douglas v. Holbert*, 335 Ark. 305, 983 S.W.2d 392 (1998).

Dismissal of a wrongful death action filed in the name of the estate was proper where the action was required to have been brought by and in the name of the personal representative as personal representative; in addition, had an amendment been allowed to substitute the name of the personal representative, it would have constituted the commencement of a

new action for which the period of limitations had expired pursuant to this section. *Estate of Byrd v. Tiner*, 81 Ark. App. 366, 101 S.W.3d 887 (2003).

Pecuniary Injuries.

The term "pecuniary injuries" in a wrongful death action refers to the present value of benefits, including money, goods and services which the deceased would have contributed to the claimed beneficiaries had she lived. *Lowe v. United States*, 662 F. Supp. 1089 (W.D. Ark. 1987).

Prior Judgment.

Where in action for injuries resulting from automobile collision by one driver against the other driver's widow as administratrix of his estate, widow did not file a cross complaint but alleged contributory negligence, judgment against the estate was held to bar subsequent action by widow against plaintiff in the former suit and his employer to recover damages occasioned by loss of contributions made to her by her deceased husband, since the widow had the duty of litigating in the former suit all the questions which she raised in the suit later brought for her personal benefit. *Morgan v. Rankin*, 197 Ark. 119, 122 S.W.2d 555 (1938) (decision under prior law).

Where a personal representative of the deceased recovered in a wrongful death action and later an unknown widow of the deceased appeared and filed another wrongful death action against the defendant, the first suit is *res judicata* and a bar to the latter. *Reed v. Blevins*, 222 Ark. 202, 258 S.W.2d 564 (1953), cert. denied, 347 U.S. 937, 74 S. Ct. 632, 98 L. Ed. 1087 (1954) (decision under prior law).

Trial court properly entered summary judgment for defendant railroad in decedent's estate's wrongful death lawsuit where the decedent's guardian had already sued the railroad and the case had been settled and the guardian had signed a release. *Estate of Hull v. Union Pac. R.R.*, 355 Ark. 547, 141 S.W.3d 356 (2004).

Where the decedent wandered away from a nursing home and was never found, and where the guardian's negligence action concluded in a dismissal with prejudice, the guardian could not have brought another negligence and wrongful death lawsuit stemming from the same

acts when the probate court declared the missing decedent was in fact dead. *Brown v. Pine Bluff Nursing Home*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 750 (Dec. 2, 2004).

Property Damage.

The action authorized by former statute could not be used to recover damages for injuries to property. *Pierce Oil Corp. v. Taylor*, 147 Ark. 100, 227 S.W. 420 (1921) (decision under prior law).

Settlement Agreement.

A memorandum agreement purporting to settle all matters involved in the administration and distribution of decedent's estate did not preclude a wrongful death action filed on behalf of the statutory heirs. *Skaggs v. Cullipher*, 57 Ark. App. 50, 941 S.W.2d 443 (1997).

Statutory beneficiaries are not entitled to notice of a petition for approval of a wrongful death settlement. *Douglas v. Holbert*, 335 Ark. 305, 983 S.W.2d 392 (1998).

Settlement proceeds do not become assets of the decedent's estate to be distributed pursuant to a will or the laws of intestate succession; instead, the proceeds of a wrongful death action are for the sole benefit of the statutory beneficiaries and may not be used to pay off debts of the estate. *Douglas v. Holbert*, 335 Ark. 305, 983 S.W.2d 392 (1998).

Trial court's denial of the adjustment company's claim to proceeds from a settlement made to an estate was affirmed because it was clear that the settlement was intended as a recovery for the estate beneficiaries and the company was precluded under subsection (e) of this section from making a claim for the deceased's debt against those proceeds. *Mid-South Adjustment Co. v. Estate of Harris*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 551 (June 30, 2004).

Statute of Limitations.

Where administrator's action against railroad for death of intestate was brought when an action for the benefit of the widow and next of kin was barred by limitations but action for the benefit of the estate was not, it must be presumed that suit was for the benefit of the estate. *Sykes v. Jameson*, 192 Ark. 631, 94 S.W.2d 718 (1936) (decision under prior law).

Action against a corporation on theory

it should be held liable for the payment of a judgment recovered against another corporation for employee's death, if a tort action, would be barred because not brought within two years after employee's death or within one year after non-suit was taken against the present defendant in the former action. *Mannon v. R.A. Young & Sons Coal Co.*, 207 Ark. 98, 179 S.W.2d 457 (1944) (decision under prior law).

The filing of an action within two years is a condition precedent to maintaining an action and the failure to bring suit within two years cannot be waived. *Wilson v. Missouri P.R.R.*, 58 F. Supp. 844 (E.D. Ark. 1945) (decision under prior law).

The period of limitations contained in this section is a part of the substantive rights created by the section, and all actions brought under the section are controlled by the limitation. *Hicks v. Missouri Pac. R.R.*, 181 F. Supp. 648 (W.D. Ark.), appeal dismissed, 285 F.2d 427 (8th Cir. 1960).

Where at time of deceased's death his cause of action for personal injuries is barred by statute of limitations, action by his personal representative for wrongful death is also barred as it is derivative in nature and arises only where original of deceased has been preserved. *Hicks v. Missouri Pac. R.R.*, 181 F. Supp. 648 (W.D. Ark.), appeal dismissed, 285 F.2d 427 (1960).

In a wrongful death action against the owner of the involved car on the theory of negligent entrustment, an amendment of the complaint after the expiration of the statute of limitations which changed the allegation as to the identity of the driver of the car was not barred by the three-year limitation of this section as it was not the beginning of a new cause of action, but a continuation of the original. *Soncini v. Rankin*, 238 Ark. 595, 383 S.W.2d 500 (1964).

In an action for wrongful death where the complaint and summons were not delivered to the sheriff until the Monday following a Sunday upon which the last day for commencing a wrongful death action fell, the action was still timely because of the application of the Sunday rule. *Vermeer Mfg. Co. v. Steel*, 263 Ark. 323, 564 S.W.2d 518 (1978).

The limitation of time fixed by a wrongful death statute is a limitation on the

right of action and is an essential element of the right to sue; therefore, the general savings clause provision has no application to wrongful death actions. *Sandusky v. First Elec. Coop.*, 266 Ark. 588, 587 S.W.2d 37 (1979).

Statute of limitations for the wrongful death action was not tolled during the minority of the plaintiffs and thus action was barred by the three year statute of limitations. *Crawford v. Martin Marietta Corp.*, 622 F.2d 339 (8th Cir. 1980).

This section does not preclude a party who has commenced a wrongful death action within three years of date of death, and who has suffered a nonsuit of that action, from recommencing it more than one year after date of nonsuit, but within three years from date of death. Legislative intent in creating the one-year-after-nonsuit provisions in this section was not to shorten limitations period in event of nonsuit. *Burkett v. PPG Indus., Inc.*, 294 Ark. 50, 740 S.W.2d 621 (1987).

The wrongful death statute created a new and separate cause of action which could arise if death was caused by any wrongful act and which carries its own statute of limitations as part of that right. For this reason, the medical malpractice statute of limitations is irrelevant when a patient dies from his injuries before the two-year period has run. *Brown v. Saint Paul Mercury Ins. Co.*, 308 Ark. 361, 823 S.W.2d 908 (1992).

Where wrongful-death complaint was not in compliance with this section, and the statute of limitations had run, barring heirs from commencing a wrongful-death action against a doctor, the wife of the deceased was also barred from pursuing a separate claim for loss of consortium, which was derivative to wrongful-death action. *Sanderson v. McCollum*, 82 Ark. App. 111, 112 S.W.3d 363 (2003).

Wrongful death action filed against healthcare providers by a decedent's parents was void ab initio where the decedent had no personal representative and the complaint failed to include as a plaintiff the decedent's half-brother; hence, under subsection (b) of this section, the parents could not add the half-brother after the limitations period had run. *Andrews v. Air Evac EMS, Inc.*, 86 Ark. App. 161, 170 S.W.3d 303 (2004).

Where an original wrongful death complaint was a nullity because it was

brought by the decedent's heirs rather than the personal representative, as required by this section, a subsequent amended complaint filed by the administratrix, which attempted to bring the estate in as a party, was a new suit filed after the statute of limitations period and, therefore, could not relate back under Ark. R. Civ. P. 15 and was barred by statute of limitations. *Rhuland v. Fahr*, 356 Ark. 382, 155 S.W.3d 2 (2004).

Summary Judgment.

Where the matter of a legal duty was the subject of a construction contract which was ambiguous as to the parties' intent, a question of fact was presented, precluding summary judgment in a wrongful death action. *Elkins v. Arkla, Inc.*, 312 Ark. 280, 849 S.W.2d 489 (1993).

Trial court properly granted summary judgment to the owners of a pool in a wrongful death action arising from the drowning of a child; the owners did not engage in any willful or wanton conduct which contributed to the child's drowning because, even though only one adult who could swim was present in the area, a pool owner had repeatedly told the deceased child to wear a life jacket and had told the children to stay in the shallow end of the pool. *Moses v. Bridgeman*, 355 Ark. 460, 139 S.W.3d 503 (2003).

Survival Action.

For a death caused by the wrongful act of another, a cause of action survives if the deceased lived after the act constituting the cause of action, whether conscious or not. *Saint Louis, I.M. & S. Ry. v. Dawson*, 68 Ark. 1, 56 S.W. 46 (1900) (decision under prior law).

The cause of action in favor of the husband for the negligent killing of his wife does not survive the husband. *Billingsley v. St. Louis, I.M. & S. Ry.*, 84 Ark. 617, 107 S.W. 173 (1907) (decision under prior law).

An action is not abated by the death of a party after the cause of action has been merged in a final judgment and while the judgment stands, even though the judgment is based on a cause of action which would not survive the death of a party before judgment. *Brundrett v. Hargrove*, 204 Ark. 258, 161 S.W.2d 762 (1942) (decision under prior law).

The survival and wrongful death causes are stated in separate sections, and the

fact that this section is entitled "Wrongful death actions—Survival" does not indicate that the survival cause of action is contained in this section. *First Com. Bank v. United States*, 727 F. Supp. 1300 (W.D. Ark. 1990).

Memorandum agreement purporting to settle all matters involved in the administration and distribution of decedent's estate settled and released an estate's survival cause of action. *Skaggs v. Cullipher*, 57 Ark. App. 50, 941 S.W.2d 443 (1997).

Unborn Child.

This section will determine whether, or to what extent, there is a right to maintain an action, or to recover damages, for the death of an unborn child and the action, if any, is a tort action cognizable in circuit court; the wrongful death statute will not be interpreted in an ex parte probate proceeding. *Carpenter v. Logan*, 281 Ark. 184, 662 S.W.2d 808 (1984).

Under the parental immunity statute, a viable fetus born dead does not have a cause of action against a mother who negligently caused the death of the fetus, regardless of whether the fetus is a "person" under the wrongful death statute. Where the claim of the fetus against the mother for negligent injury is barred by the parental immunity doctrine, the derivative claims by the fetus and its siblings under the wrongful death statute are also barred. *Carpenter ex rel. Carpenter v. Bishop*, 290 Ark. 424, 720 S.W.2d 299 (1986).

"Person" does not include a viable fetus for the purpose of the wrongful death statute. *Chatelain v. Kelley*, 322 Ark. 517, 910 S.W.2d 215 (1995).

A viable fetus is a "person" within the meaning of this section. *Aka v. Jefferson Hosp. Ass'n*, 344 Ark. 627, 42 S.W.3d 508 (2001).

Cited: *De Long v. Green*, 229 Ark. 100, 313 S.W.2d 370 (1958); *Peugh v. Oliger*, 233 Ark. 281, 345 S.W.2d 610 (1961); *Glick v. Ballentine Produce, Inc.*, 343 F.2d 839 (8th Cir. 1965); *MFA Mut. Ins. Co. v. Lovins*, 248 F. Supp. 108 (E.D. Ark. 1965); *McGinty v. Ballentine Produce, Inc.*, 241 Ark. 533, 408 S.W.2d 891 (1966); *Matthews v. Travelers Indem. Ins. Co.*, 245 Ark. 247, 432 S.W.2d 485 (1968); *Maryland Cas. Co. v. Rowe*, 256 Ark. 221, 506 S.W.2d 569 (1974); *Russ v. Ratliff*, 578 F.2d 221 (8th Cir. 1978); *Pickens-Bond Constr. Co. v. Case*, 266 Ark. 323, 584 S.W.2d 21 (1979); *Hopkins v. Chip-In-Saw, Inc.*, 630 F.2d 616 (8th Cir. 1980); *Webb v. Harvell*, 563 F. Supp. 172 (W.D. Ark. 1983); *Martin v. Rieger*, 289 Ark. 292, 711 S.W.2d 776 (1986); *Dawson v. Gerritsen*, 290 Ark. 499, 720 S.W.2d 714 (1986); *Burrows v. Turner Mem. Hosp.*, 762 F. Supp. 840 (W.D. Ark. 1991); *Ruffins v. ER Ark.*, 313 Ark. 175, 853 S.W.2d 877 (1993); *Pickens v. Black*, 316 Ark. 499, 872 S.W.2d 405 (1994); *Holmes v. McClendon*, 349 Ark. 162, 76 S.W.3d 836 (2002); *Estate of Hull v. Union Pac. R.R.*, 355 Ark. 547, 141 S.W.3d 356 (2004); *Cockrum v. Fox*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 743 (Dec. 2, 2004).

16-62-103. Suits involving public officers.

No suit, action, or other proceeding lawfully commenced by or against any public officer in this state in his or her official capacity or in relation to the discharge of his or her official duties shall abate by reason of his or her death or the expiration of his term of office or his or her retirement, resignation, or removal from office. In such event the court, on motion or supplemental petition filed at any time within twelve (12) months thereafter, showing the necessity for the survival thereof, to obtain a settlement of the question involved, may allow the action or other proceeding to be maintained by or against his or her successor in office. The court may make such order as shall be equitable for the payment of costs.

History. Acts 1925, No. 109, § 1; Pope's Dig., § 1253; A.S.A. 1947, § 27-1021.

CASE NOTES

ANALYSIS

Delivery to successor.
Timeliness.

Delivery to Successor.

This section contemplates that the sheriff shall deliver over to his successor in office such goods and moneys as he may receive, and that any suit pending shall survive and may be revived against the successor to recover from him the same goods or property, or moneys, as were sought to be recovered in the beginning. *State ex rel. Glover v. McIlroy*, 196 Ark. 63, 116 S.W.2d 601 (1938).

Sheriff's failure to deliver over to his successor property and money coming into

his hands as such officer is a violation of this section and a breach of the obligation of the contract evidenced by his bond. *State ex rel. Glover v. McIlroy*, 196 Ark. 63, 116 S.W.2d 601 (1938).

Timeliness.

Action against sureties on bond of former sheriff commenced more than four years after date on which he was required to turn over to his successor property and money in his hands, to recover value of property which the sheriff had attached, was barred by limitations, though filed soon after determination of suit in replevin against sheriff. *State ex rel. Glover v. McIlroy*, 196 Ark. 63, 116 S.W.2d 601 (1938).

16-62-104. Death or expiration of powers — Effect upon action.

(a) Where there are several plaintiffs or defendants in an action, and one (1) of them dies, or his or her powers as a personal representative cease, if the right of action survives to or against the remaining parties, the action may proceed, the death of the party or the cessation of his powers being stated on the record.

(b) Where one (1) of several plaintiffs or defendants dies, or his or her powers as a personal representative cease, if the cause of action does not admit of survivorship, and the court is of opinion that the merits of the controversy can be properly determined and the principles applicable to the case fully settled, it may proceed to try the cause as between the remaining parties. However, the judgment shall not prejudice any who were not parties at the time of the trial.

History. Civil Code, §§ 549, 550; C. & §§ 1256, 1257; A.S.A. 1947, §§ 27-1001, M. Dig., §§ 1053, 1054; Pope's Dig., 27-1002.

16-62-105. Death or expiration of powers — Revivor of action.

(a) Where one (1) of the parties to an action dies, or his or her powers as a personal representative cease before the judgment, if the right of action survives in favor of or against his representative or successor, the action may be revived and proceed in their names.

(b) The revivor shall be by an order of the court that the action be revived in the names of the representatives or successor of the party who died, or whose powers ceased, and proceed in favor of or against them.

(c) The order may be made on the motion of the adverse party, or of the representatives or successor of the party who died or whose powers ceased, suggesting his or her death or the cessation of his or her powers,

which with the names and capacities of his representative or successor, shall be stated in the order.

(d)(1) If the order is made by the consent of the parties, the action shall forthwith stand revived.

(2) If not made by consent, the order shall be served in the same manner as a summons upon the party adverse to the one making the motion. At the first term commencing not less than ten (10) days after such service, the party on whom it is made may show cause against the revivor. If sufficient cause is not then shown, the cause shall stand revived.

(e) If ten (10) days' notice has been given to the representatives or successor of the party who died or whose powers ceased of the motion by the adverse party, where the motion is by such representatives or successor, and due return is made of the service of notice, the court may, if sufficient cause is not shown to the contrary, make an order reviving the action in the names of such parties, whereupon the action shall stand revived.

(f)(1) Where it appears to the court by the affidavit of the plaintiff that the representatives of the defendant, or any of them, in whose name the action is ordered to be revived, are nonresidents of this state, have left the state to avoid the service of the order, have been absent therefrom four (4) months, or so conceal themselves that the order cannot be served upon them or that the names of the heirs of the defendant against whom the action is ordered to be revived, or of some of them, are unknown to the affiant, an order may be made by the court warning the representatives or unknown heirs to appear on the first day of its next term and show cause why the action should not be revived against them.

(2) The parties so warned shall be deemed constructively served with a copy of the order of revivor ten (10) days before the term at which they are warned to appear; and, if sufficient cause is not shown to the contrary, the action shall, at that term, stand revived.

History. Civil Code, §§ 551-556; C. & M. Dig., §§ 1055-1060; Pope's Dig., §§ 1258-1263; A.S.A. 1947, §§ 27-1003 — 27-1008.

A.C.R.C. Notes. The Supreme Court

of Arkansas stated in a Per Curiam of Nov. 24, 1986, that subsections (a)-(e) of this section were deemed superseded by the Arkansas Rules of Civil Procedure.

CASE NOTES

ANALYSIS

Applicability.
Appeals.
Cause.
Order.
Revival of action.
Service.

Applicability.

Subsection (e) applies to actions pend-

ing in the Supreme Court on appeal. Temple v. Culp, 105 Ark. 222, 150 S.W. 867 (1912).

Appeals.

An order of revivor is not appealable. Blum v. Pulaski County, 92 Ark. 101, 122 S.W. 109 (1909).

Where a judgment by lapse of time for appeal became final during the lifetime of

the successful party, there was, on the death of said party, no necessity for a revivor to enforce same. *Hayes v. Whyte*, 193 Ark. 918, 103 S.W.2d 628 (1937).

Where record on appeal was filed after death of party to action and brief was later filed and case submitted for decision on appeal, court, after decision on appeal, will not consider motion to dismiss appeal on grounds that cause of action had abated and there had been no revival as provided herein, the question of abatement being waived by failure to raise it when case first considered on appeal. *Short v. Stephenson*, 239 Ark. 287, 388 S.W.2d 912 (1965).

Cause.

Where a cause is revived by entry of an order and service of summons, if no valid cause is shown against the revivor at the next succeeding term of court, the action stands revived, and no further order of the court is necessary. *Vandiever v. Conditt*, 110 Ark. 311, 162 S.W. 47 (1913).

Order.

An order of court is required to revive an action, when one of the parties dies before final judgment. *Higgerson v. Higgerson*, 212 Ark. 123, 205 S.W.2d 33 (1947).

Revival of Action.

An action commenced by an administrator and abated because of the subsequent revocation of his letters may be revived

upon his subsequent reinstatement. *Hill v. Bryant*, 61 Ark. 203, 32 S.W. 506 (1895).

The revival of a suit on notes within the proper time amounts to the presentation of the claim to the administrator. But where the mortgagee in a suit to foreclose a real estate mortgage failed to revive the action against the heirs within a year after the death of the mortgagor, it was error to make them parties, though it was revived against the administrator. *Hill v. Brittain*, 178 Ark. 784, 12 S.W.2d 869 (1929).

Where the right of action survives in favor of or against the representatives upon the death of a party, the action may be revived and proceed in their names. *Higgerson v. Higgerson*, 212 Ark. 123, 205 S.W.2d 33 (1947).

Where original administrator of decedent's estate resigned and an administrator in succession was appointed same day, even if action abated upon removal of original administrator and had to be revived in name of his successor, the order of revivor would relate back to date of appointment of administrator in succession, leaving no interval during which circuit court was without jurisdiction. *Carnes v. Strait*, 223 Ark. 962, 270 S.W.2d 920 (1954).

Service.

An order of revivor must be served on a minor as a summons is served. *Haley v. Taylor*, 39 Ark. 104 (1882).

Cited: *McNutt v. State*, 48 Ark. 30, 2 S.W. 254 (1886).

16-62-106. Death of a party — Revivor in name of special administrator.

(a) In all cases where suits may be instituted, and either plaintiff or defendant dies pending the suit or suits, it shall be lawful for the court before which the suit or suits are pending, on the motion of any party interested, to appoint a special administrator, in whose name the cause shall be revived. The suit or suits shall progress, in all respects in his or her name with like effect as if the plaintiff or defendant, as the case may be, had remained in full life.

(b) The powers of the special administrator shall extend and be confined alone to the mere prosecution or defense of the particular suit or suits which he may be appointed by the court to prosecute or defend.

(c) No special administrator shall be appointed as prescribed in this section where there is a general administrator.

(d) No such special administrator or executor shall be liable for costs of the suit, for the management whereof he or she may be appointed.

History. Acts 1851, §§ 1, 2, 4, p. 102; C. & M. Dig., §§ 1050-1052; Pope's Dig., §§ 1252, 1254, 1255; A.S.A. 1947, §§ 27-1009 — 27-1011.

Publisher's Notes. This section may be affected by § 14-14-101 et seq.

CASE NOTES

ANALYSIS

Applicability.
Revival.
Service of process.
Subsequent law.

Applicability.

Subsection (a) is applicable only where court has already acquired jurisdiction over person who dies pendente lite. *Carnes v. Strait*, 223 Ark. 962, 270 S.W.2d 920 (1954).

Revival.

It was held that an order of sale of lands could be made without a revivor in the name of the heirs. *Lanier v. Shonyo*, 133 Ark. 396, 201 S.W. 108 (1918).

There is no abatement of an action which is revived in the name of the successor or representative of the deceased party; the revivor operates as a continuation of the original action. *United States Fid. & Guar. Co. v. St. Louis, I.M. & S. Ry.*, 135 Ark. 1, 204 S.W. 416 (1918).

On appeal by deceased claimant's widow and heirs from order limiting claim against county it was unnecessary but not unlawful to appoint special administrator.

Madison County v. Nance, 182 Ark. 775, 32 S.W.2d 1073 (1930).

Where, following perfection of appeal by guardian of insane ward from order to apply to probate court of another state for authority to pay attorney's fee and maintenance money awarded to ward's wife in guardian's suit for annulment of ward's marriage, the ward died, the suit should abate. *Sutter v. Rippe*, 207 Ark. 80, 178 S.W.2d 1008 (1944).

Service of Process.

Where service of process was not had in action filed in circuit court against resident of another county before death of defendant, appointment by circuit court of special administrator upon whom summons was served was void, and court was without jurisdiction to try case. *Carnes v. Strait*, 223 Ark. 962, 270 S.W.2d 920 (1954).

Subsequent Law.

This section, authorizing the appointment of a special administrator, was not repealed by the code provisions on the subject. *Lanier v. Shonyo*, 133 Ark. 396, 201 S.W. 108 (1918).

Cited: *Sutter v. Rippe*, 207 Ark. 80, 178 S.W.2d 1008 (1944).

16-62-107. Revivor of actions against personal representative of defendant.

(a) An order to revive an action against the personal representative of a defendant, or against him or her and the heirs or devisees of the defendant, may be made at any time after the appointment of the personal representative. Upon application, the court shall grant such reasonable continuance as may be necessary to enable the personal representative properly to prepare for trial.

(b)(1) An order to revive an action against the personal representative of a decedent for the purpose of proving a claim against the estate of the decedent shall not be made after the time fixed by law for filing claims against the said estate.

(2) An order of revivor may, however, be made against the personal representative of a deceased defendant after the expiration of the time for filing claims against the estate in any case where the personal representative may be a necessary or proper party for the determination of rights of the estate in the subject matter of the action.

(3) No order of revivor against either the personal representative or the heirs or devisees of the decedent shall be made except with the consent of such personal representative, heirs, or devisees unless made within one (1) year from the time when it could first have been made, except as provided in § 16-62-108.

History. Civil Code, §§ 560, 561; C. & M. Dig., §§ 1064, 1065; Pope's Dig., §§ 1267, 1268; Acts 1963, No. 84, §§ 2, 3; A.S.A. 1947, §§ 27-1015, 27-1016.

CASE NOTES

ANALYSIS

In general.
Applicability.
Intervention.
Order.
Parties.
Timeliness.

In General.

The power to revive without consent ceases at the expiration of the time limited by this section. *Cole v. Hall*, 85 Ark. 144, 107 S.W. 175 (1907); *Peay v. Pulaski County*, 103 Ark. 601, 148 S.W. 491 (1912); *Bank of Des Arc v. Moody*, 110 Ark. 39, 161 S.W. 134 (1913).

This section is mandatory. *Dupree v. Smith*, 150 Ark. 80, 233 S.W. 812 (1921); *Prager v. Wootton*, 182 Ark. 37, 30 S.W.2d 845 (1930).

Applicability.

Subsection (a) refers to the final, not the conditional, order of revivor. *McNutt v. State*, 48 Ark. 30, 2 S.W. 254 (1886); *State Fair Ass'n v. Townsend*, 69 Ark. 215, 63 S.W. 65 (1901).

Subsection (b) applies to cases pending in the Supreme Court on appeal as well as to cases pending before judgment in circuit court. *Temple v. Culp*, 105 Ark. 222, 150 S.W. 867 (1912).

Intervention.

An heir of decedent, in filing his intervention, entered the litigation voluntarily as he found it and cannot later be heard to complain of the proceedings had prior to the time of intervention; in other words, where suit against the decedents abated at their deaths, the intervention by the heir of decedents had the effect of beginning a new action by him as alleged owner of the land. *Bingham v. Zeno*, 228 Ark. 1039, 312 S.W.2d 181 (1958).

Where defendant in suit to quiet title

died and the deed under which defendant claimed title was a conveyance to defendant jointly as husband and wife, such defendant would have held such title as a tenancy by the entirety and, therefore, when defendant died any title he may have held expired and there was nothing to revive under the provisions of this section, but the whole claimed estate would be in his widow who was not a party to the action; and therefore, a petition to intervene by the widow of the plaintiff, although filed later than the time within which an action could be revived under this section, would be treated as a new action. *Wilson v. Huggins*, 228 Ark. 1115, 314 S.W.2d 694 (1958).

Order.

An order of revivor is not a final decree. *Blum v. Pulaski County*, 92 Ark. 101, 122 S.W. 109 (1909).

Parties.

A suit to cancel a trustee's deed will be dismissed when it was not revived against the heirs or devisees of the deceased grantee within the one year period although it was revived against the executor, since the heirs were necessary parties. *Blake v. Thompson*, 176 Ark. 840, 4 S.W.2d 514 (1928).

Timeliness.

Where a defendant died during the pendency of an appeal taken by the plaintiff, and the latter neglected to revive the suit against the administrator for more than 18 months after his appointment, and neither the administrator nor his heirs consented to the revivor, the appeal will be dismissed. *State Fair Ass'n v. Townsend*, 69 Ark. 215, 63 S.W. 65 (1901).

Where a suit to cancel a trustee's deed and for an accounting for rents was improperly revived against the executor of

the grantee on the latter's death and the heirs were not made parties until five years later, the cause of action was barred.

Blake v. Thompson, 176 Ark. 840, 4 S.W.2d 514 (1928).

16-62-108. Revivor of actions against plaintiff's representative or successor — Exception.

An order to revive an action in the names of the representatives or successor of a plaintiff may be made forthwith. However, an order to so revive the action shall not be made without the consent of the defendant after the expiration of one (1) year from the time when the order might first have been made. Where the defendant shall also have died, or his or her powers have ceased in the meantime, the order of revivor on both sides may be made within the period provided by this section or the period provided by § 16-62-107(b), whichever shall be longer.

History. Civil Code, § 562; C. & M. Dig., § 1066; Pope's Dig., § 1269; Acts 1963, No. 84, § 4; A.S.A. 1947, § 27-1017.

Publisher's Notes. Acts 1963, No. 84,

§ 5, provided: "The provisions of this act shall apply in all cases where the death of a party or the cessation of his powers occurs after the effective date hereof."

CASE NOTES

ANALYSIS

Applicability.

Construction with other laws.

Intervention.

Order.

Timeliness.

Applicability.

This section applies equally where there is no general administrator or executor as where there is one, because in such event the persons interested may have a revivor in the name of a special administrator. Anglin v. Cravens, 76 Ark. 122, 88 S.W. 833 (1905).

Construction With Other Laws.

This section is not superseded by Ark. R. Civ. P. 25, as the statute creates a special proceeding with a different procedure distinct from an ordinary civil action to which the court rules apply. Nix v. St. Edward Mercy Med. Ctr., 342 Ark. 650, 30 S.W.3d 746 (2000).

Intervention.

Where, in a suit to cancel a note and mortgage, one alleging purchase of same becomes a party, he is in effect an intervener, and, for purposes of a motion to revive the action, he is in effect a plaintiff. Gorham v. Hall, 172 Ark. 744, 290 S.W. 357 (1927).

Order.

An order of revivor may be made as soon as the court in which the action is pending convenes after the death of the plaintiff. Anglin v. Cravens, 76 Ark. 122, 88 S.W. 833 (1905).

Where, within one year after plaintiff's death, motion was made to revive case in name of executors and court ordered defendant to show cause why the cause should not be revived, and thereafter executors filed a substituted complaint and an amendment to their complaint, it was tantamount to an order of the court receiving the cause since until after the lapse of one year it was not necessary to require the defendants to show cause. Keffer v. Stuart, 127 Ark. 498, 193 S.W. 83 (1917).

Timeliness.

Order of revivor made within one year from first day the court in which the action was pending was in session following the death of plaintiff was held timely, and no notice to defendants was necessary. Heilig v. Haskins, 192 Ark. 311, 90 S.W.2d 986 (1936).

Where at the time of his death decedent had suit pending to have his rights determined in certain land and to have those rights enforced, failure of his heirs to have the suit revived within one year from the

next session of court after his death barred any claim the heirs may have otherwise had in subsequent suit involving title to the property. *Woolfolk v. Davis*, 225 Ark. 722, 285 S.W.2d 321 (1955).

Where after death of plaintiff, suit in state court was not revived within the

period prescribed by this section and state court action was dismissed, administrator of deceased plaintiff could not thereafter bring the same action in federal court. *Robison v. Jones*, 261 F.2d 584 (8th Cir. 1958).

16-62-109. Time for revivor — Effect of expiration.

When it appears to the court by affidavit that either party to an action has been dead, or, where he or she sues or is sued as a personal representative, that his or her powers have ceased for a period so long that the action cannot be revived in the names of his or her representatives or successor without the consent of both parties, it shall order the action to be stricken from the docket.

History. Civil Code, § 563; C. & M. Dig., § 1067; Pope's Dig., § 1270; A.S.A. 1947, § 27-1018.

CASE NOTES

Cited: *Blum v. Pulaski County*, 92 Ark. 101, 122 S.W. 109 (1909); *Temple v. Culp*, 105 Ark. 222, 150 S.W. 867 (1912); *Dupree v. Smith*, 150 Ark. 80, 233 S.W. 812 (1921); *Robison v. Jones*, 158 F. Supp. 658 (W.D. Ark. 1958).

16-62-110. Failure of plaintiff's representatives to revive after notice — Motion to strike.

At any term of the court succeeding the death of the plaintiff, while the action remains on the docket, the defendant having given to the plaintiff's proper representatives, in whose names the action might be revived, ten (10) days' notice of the application therefor, may have an order to strike the action from the docket, and for costs against the estate of the plaintiff, unless the action is forthwith revived.

History. Civil Code, § 564; C. & M. Dig., § 1068; Pope's Dig., § 1271; A.S.A. 1947, § 27-1019.

CASE NOTES

Cited: *Keffer v. Stuart*, 127 Ark. 498, 193 S.W. 83 (1917).

16-62-111. Trial not postponed by revivor.

When, by the provisions of § 16-62-110, an action stands revived, the trial thereof shall not be postponed by reason of the revivor, if the action would have stood for trial at the term the revivor is complete, had no death or cessation of powers taken place.

History. Civil Code, § 565; C. & M. Dig., § 1069; Pope's Dig., § 1272; A.S.A. 1947, § 27-1020.

CHAPTER 63

PLEADINGS AND PRETRIAL PROCEEDINGS

SUBCHAPTER

1. GENERAL PROVISIONS.
2. PLEADINGS.
3. JOINDER.
4. CONTINUANCE OR DISMISSAL.
5. CITIZEN PARTICIPATION IN GOVERNMENT ACT.

Publisher's Notes. Some provisions of this chapter may be superseded by the Arkansas Rules of Civil Procedure and the Rules for Inferior Courts pursuant to the

Supersession Rule adopted by the Supreme Court of Arkansas in its order of December 18, 1978.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 16-63-101. Pretrial conferences.
16-63-102. Deposits in court.
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Effective Dates. Acts 1949, No. 301, § 4: approved Mar. 19, 1949. Emergency clause provided: "This Act is necessary to insure orderly procedure in the circuit and chancery courts; and being necessary for

the immediate preservation of the public peace, health and safety, an emergency is hereby declared to exist; and this Act shall be in full force and effect from and after its passage."

16-63-101. Pretrial conferences.

(a) Actions taken at the conference, amendments allowed to the pleadings, rulings of the court, stipulations to be considered in evidence, and agreements made by the parties on any of the matters considered will be made a part of the record in the case.

(b) Objections may be made and exceptions saved at the time the order is made or when the action is called for trial unless the record entry is reached by agreement of all parties with full understanding of the subject matter agreed upon.

(c) For the purpose set out in subsections (a) and (b) of this section, if a pretrial conference is ordered by the court, it must be in the county where the cause is pending and after due and reasonable notice of the time and place is given to the litigants or their counsel.

(d) If the pretrial conference is conducted by agreement of the court and the litigants or their counsel, the pretrial conference may be held at any time and place in the judicial district which may be agreed upon.

(e) A defendant named in a complaint filed in any of the courts of this state who participates in a pretrial conference held pursuant to the provisions of this section or who avails himself or herself of any of the discovery procedures authorized under §§ 16-44-115 — 16-44-120 shall not thereby be deemed or held to have entered his or her general appearance in the cause, nor to have waived his or her right, otherwise existing, to object to the sufficiency of any process or the service thereof, or the jurisdiction of the court over his or her person, or to any defect in the venue as laid in the cause.

History. Acts 1949, No. 301, §§ 2, 3; 1957, No. 288, § 2; A.S.A. 1947, §§ 27-2402, 27-2403, 28-361.

CASE NOTES

Cited: Reynolds v. Holmes, 232 Ark. 783, 340 S.W.2d 383 (1960).

16-63-102. Deposits in court.

(a)(1) Whenever, in the exercise of its authority, a court has ordered the deposit or delivery of money or other thing and the order is disobeyed, the court, besides punishing the disobedience, may make an order requiring the sheriff to take the money or thing and deposit or deliver it in conformity with its directions.

(2)(A) The court may direct the sheriff to keep safe any property delivered pursuant to the provisions of this section and may allow him or her the necessary expenses attending the property, to be paid by such party as the court shall direct, and taxed in the costs of the action.

(B) The court may confide to the sheriff money deposited or paid into court, which shall be kept by him or her under the same requirements and responsibilities of himself or herself and his or her sureties as are provided by this code in respect to money deposited in lieu of bail.

(b) A court sitting in a county in which, or in any county adjoining which, there is a bank or a branch of a bank, created by the laws of this state or the United States, transacting regular banking business, may order money paid into court to be deposited in that bank or branch to the credit of the court, in the action or proceeding in which the money was paid. Money so deposited shall be paid only upon the check of the clerk of the court annexed to its certified order for the payment and in favor of the person to whom the order directs the payment to be made.

(c) Money deposited or paid into the court in any action shall not be loaned out by the court unless it is with the consent of all the parties having an interest in or making claim to the money.

History. Civil Code, §§ 329-333; C. & M. Dig., §§ 1346-1350; Pope's Dig., §§ 1571-1575; A.S.A. 1947, §§ 27-1602 — 27-1606.

Publisher's Notes. The code referred to in this section is the Code of Practice in Civil Cases of 1869. See parallel reference tables in tables volume.

CASE NOTES

Liability of Clerk.

Unless the clerk is protected by an order of the court in depositing money which constitutes a fund in court in a bank, he

does so at his peril, and will be responsible therefor on his official bond on failure of the bank. *Martin v. Bogard*, 176 Ark. 203, 2 S.W.2d 700 (1928).

SUBCHAPTER 2 — PLEADINGS

SECTION.

- 16-63-201. Pleadings generally.
- 16-63-202. Filing pleadings.
- 16-63-203. [Repealed.]
- 16-63-204. Answer by guardian of infant or insane person or by attorney for prisoner.
- 16-63-205. Counterclaim.
- 16-63-206. Setoffs.
- 16-63-207. Libel and slander.
- 16-63-208. [Superseded.]
- 16-63-209. Instrument for payment of money only — Sufficiency of pleading.
- 16-63-210. Actions for recovery of real property.
- 16-63-211. [Superseded.]

SECTION.

- 16-63-212. Presumptions and matters of judicial notice.
- 16-63-213. Irrelevant or redundant matter.
- 16-63-214. Variance between pleading and proof.
- 16-63-215. [Superseded.]
- 16-63-216. Constructive service — Proof of allegations.
- 16-63-217. Depositions.
- 16-63-218. Original papers not removed.
- 16-63-219. Fee for discovery of medical records.
- 16-63-220. Reply to action brought by prisoner.

Cross References. Impeachment proceedings, pleadings, § 21-12-203.

Effective Dates. Acts 1855, § 13, p. 196: effective on passage.

Acts 1871, No. 48, § 1 [890]: effective 90 days after passage.

Acts 1915, No. 290, § 24: June 1, 1915.

Acts 1935, No. 91, § 2: Mar. 2, 1935. Emergency clause provided: "The immediate operation of this act being necessary for the public peace, health, and safety, an emergency is hereby declared to exist, and this act shall take effect and be in full force immediately from and after its passage and approval."

Acts 1975, No. 204, § 2: Feb. 18, 1975. Emergency clause provided: "It is hereby found and determined by the General Assembly that confusion now exists as to the discretion of the circuit and chancery courts of this State to allow assertion of counterclaim by way of amended pleadings and that an immediate clarification

of the court's power is essential. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from the date of its passage and approval."

Acts 1997, No. 286, § 5: Feb. 26, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that litigation of a frivolous nature by incarcerated persons is flooding the state court systems. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Gover-

nor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

16-63-201. Pleadings generally.

The pleadings are the written statements, by the parties of the facts constituting their respective claims and defenses.

History. Civil Code, § 105; C. & M. Dig., § 1183; Pope's Dig., § 1405; A.S.A. 1947, § 27-1101.

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law, Civil Procedure, 1 UALR L.J. 131.

CASE NOTES

ANALYSIS

In general.
Divorce.
Further plea.

In General.

All pleadings in circuit court should be written. *Rosewater v. Schwab Clothing Co.*, 58 Ark. 446, 25 S.W. 73 (1894).

The object of pleadings is to apprise the other party of what is admitted and what he must establish by proof. *Beasley v. Haney*, 96 Ark. 568, 132 S.W. 646 (1910).

A plaintiff is only required to state the facts constituting his claim or cause of action. *Chicago, R.I. & P. Ry. v. Lockwood*, 244 Ark. 122, 424 S.W.2d 158 (1968).

Divorce.

Pleadings in a divorce case must be in writing, so that each party as well as the

court may know what issues are to be tried. *Bachus v. Bachus*, 216 Ark. 802, 227 S.W.2d 439 (1950).

In a supplementary hearing in a divorce action where no pleadings were filed or waived by the parties, the court in making an order reducing amount of alimony was without jurisdiction and the order was void. *Bachus v. Bachus*, 216 Ark. 802, 227 S.W.2d 439 (1950).

Further Plea.

Where defendant's motion to abate complaint, quash summons, and set aside purported service thereof was overruled and defendant given ten days to plead further, a motion to vacate the court's order overruling the previous motion was not a further plea within the meaning of this section. *Widmer v. Kennedy, Albers & Phillips, Inc.*, 243 Ark. 527, 421 S.W.2d 609 (1967).

16-63-202. Filing pleadings.

(a) Parties shall file with all pleadings and motions one (1) copy thereof, which copy may be withdrawn by the opposite party or his or her attorney for his or her files.

(b) If the party filing a pleading desires a copy of the pleading, he or she shall make and retain the copy at the time the original is prepared, or he or she or any other interested person may have access to the papers for the purpose of examining or copying the pleadings.

History. Acts 1915, No. 290, § 18; C. & M. Dig., § 1186; Pope's Dig., § 1408; A.S.A. 1947, § 27-1104.

CASE NOTES

Cited: Gregory v. Rubel, 184 Ark. 55, 41 S.W.2d 771 (1931).

16-63-203. [Repealed.]

Publisher's Notes. This section, concerning verification of pleadings, was repealed by Acts 2003, No. 1185, § 192. The section was derived from Civil Code §§ 136, 158, 159, 604, 792; Acts 1855, § 9,

p. 196; 1873, No. 88, § 1 [792], p. 213; C. & M. Dig., §§ 1216-1218, 1220, 1245, 1246, 9297; Acts 1935, No. 91, § 1; Pope's Dig., §§ 1439-1442, 1444, 1469, 1470, 11983; A.S.A. 1947, §§ 27-1106 — 27-1112.

16-63-204. Answer by guardian of infant or insane person or by attorney for prisoner.

It shall be the duty of the guardian of an infant or of a person of unsound mind, or an attorney appointed for a prisoner, to file an answer denying the material allegations of the complaint prejudicial to the defendant.

History. Civil Code, § 122; C. & M. Dig., § 1203; Pope's Dig., § 1425; A.S.A. 1947, § 27-1122.

CASE NOTES

ANALYSIS

In general.
Compromise.
Preserving evidence.
Proof.
Sufficiency.

In General.

A guardian ad litem for an infant can admit nothing. He must deny and put in issue every material fact alleged. *Evans v. Davies*, 39 Ark. 235 (1882).

Neither the guardian nor the guardian's attorney can make any admissions to the prejudice of the ward. *McLoy v. Arnett*, 47 Ark. 445, 2 S.W. 71 (1886).

Compromise.

A guardian cannot agree to any compromise or settlement without the concurring sanction of the court. *Rankin v. Schofield*,

70 Ark. 83, 66 S.W. 197 (1902); *Rankin v. Schofield*, 71 Ark. 168, 70 S.W. 306 (1902).

Preserving Evidence.

This section does not require that the guardian preserve the evidence in the record. *Price v. Hartzell*, 135 Ark. 440, 205 S.W. 829 (1918).

Proof.

Burden of proof was on the plaintiff and he had the right to open and close the argument. *Kilpatrick v. Rowan*, 119 Ark. 175, 177 S.W. 893 (1915).

Sufficiency.

The answer of the guardian ad litem representing minors in a foreclosure of a mortgage denying each and every material allegation of the complaint that was prejudicial is sufficient. *Thomas v. McCullum*, 201 Ark. 320, 144 S.W.2d 467 (1940).

16-63-205. Counterclaim.

When it appears that a new party is necessary to a final decision upon the counterclaim, the court may either permit the new party to be made by a summons to reply to the counterclaim in the answer or may direct that it be stricken out of the answer and made the subject of a separate action.

History. Civil Code, § 118; C. & M. Dig., § 1196; Pope's Dig., § 1418; A.S.A. 1947, § 27-1124.

CASE NOTES**ANALYSIS**

New parties.
Probate.

New Parties.

A party sued for assault is not entitled to bring in new parties in a counterclaim for slander, where they were not concerned in the original case. *Collier v.*

Thompson, 180 Ark. 695, 22 S.W.2d 562 (1929).

Probate.

Counterclaim provisions do not apply to will contests or probate of a will. *Coleman v. Coleman*, 257 Ark. 404, 520 S.W.2d 239 (1975).

Cited: *Flanagan v. O.R. Burden Constr. Corp.*, 238 Ark. 43, 377 S.W.2d 870 (1964).

16-63-206. Setoffs.

(a) A setoff may be pleaded in any action for the recovery of money and may be a cause of action arising either upon contract or tort.

(b) In suits by executors or administrators, debts existing against their testators or intestates and owing to the defendant at the time of the death of the testator or intestate may be set off by the defendant in the same manner as if the action had been brought by and in the name of the deceased.

(c) Judgments, bills, bonds, notes, or other writings assigned to the defendant after suit has been commenced against him or her shall not be allowed to be set off against the demands of the plaintiff.

(d) When any plaintiff shall be indebted to a defendant in any bond, bill, note, contract, book account, or other liquidated demand and the defendant fails to set off the debt against the plaintiff's demand, the defendant shall be forever barred from recovering costs in any suit which he or she may thereafter institute upon any such bond, bill, note, contract, book account, or other liquidated demand.

(e) Where it appears that a new party is necessary to a final decision upon the setoff, the court shall permit the new party to be made, if it also appears that, owing to the insolvency or nonresidence of the plaintiff or other cause, the defendant will be in danger of losing his or her claim unless permitted to use it as a setoff.

History. Rev. Stat., ch. 139, §§ 2, 3, 7; Civil Code, §§ 119, 120; Acts 1917, No. 267, § 2, p. 1441; C. & M. Dig., §§ 1197-1201; Pope's Dig., §§ 1419-1423; A.S.A. 1947, §§ 27-1125 — 27-1129.

RESEARCH REFERENCES

UALR L.J. Seventeenth Annual Survey of Arkansas Law — Civil Procedure, 17 UALR L.J. 447.

CASE NOTES

ANALYSIS

Construction.
Applicability.
Action against state.
Action for recovery of money.
Banks.
Conversion.
Evidence.
Instructions.
Judgment.
Open accounts.
Property.
Remand.
Statute of nonclaim.

Construction.

Subsection (a) has been liberally construed by the court so as to arrive at a true balance when mutual demands exist. *Leonard v. Taylor*, 183 Ark. 933, 39 S.W.2d 704 (1931).

Although §§ 16-56-102 and 16-65-603(a) permit judgments to be set off against each other, subsection (c) of this section prevents the setoff of judgments assigned to the defendant after suit has been commenced against him. *Donoho v. Donoho*, 318 Ark. 637, 887 S.W.2d 290 (1994).

Sections 16-56-102 and 16-65-603(a) are provisions generally authorizing that a demand, right or course of action may be asserted by setoff and also permitting money judgments to be set off (having due regard to the legal and equitable rights of all persons interested in both judgments), while subsection (c) of this section is a specific provision governing the timeliness of setoffs, disallowing those judgments assigned to a defendant after the plaintiff commenced suit against the defendant; because these three provisions can be read in harmony, neither § 16-56-102 nor § 16-65-603(a) impliedly repeal subsection (c) of this section. *Donoho v.*

Donoho, 318 Ark. 637, 887 S.W.2d 290 (1994).

Applicability.

Subsection (d) had no application where the action was for goods furnished and the demand against plaintiff was in the nature of a claim for unliquidated damages. *Milner v. Camden Lumber Co.*, 74 Ark. 224, 85 S.W. 234 (1905).

Subsection (b) has no application to person who was not the owner or holder of note which he seeks to use as setoff at time of decedent's death. *Watkins v. Parker*, 97 Ark. 492, 134 S.W. 1187 (1911).

This section is broad enough to include both setoff and recoupment, which is available as a defense to defendant regardless of whether plaintiff has filed bankruptcy or been discharged in bankruptcy. *Walker v. First Com. Bank*, 317 Ark. 617, 880 S.W.2d 316 (1994).

Action Against State.

The state is entitled to a setoff against a warrant issued for construction work under a valid highway contract though the warrant had passed to an innocent purchaser, and the refunding board could not allow the warrant until it was determined by the highway audit commission or by a competent court what amount was due the claimant. *Refunding Bd. v. State Hwy. Audit Comm'n*, 189 Ark. 144, 70 S.W.2d 1027 (1934).

Action for Recovery of Money.

The damages in a cause of action for brokers' commissions are not unliquidated and unavailing as a setoff when there is no controversy over the price to be paid for the services. *Burton v. Blytheville Realty Co.*, 108 Ark. 411, 158 S.W. 131 (1913) (decision prior to 1917 amendment).

A cause of action arising either upon contract or tort may form the subject

matter of a counterclaim in any action for the recovery of money and this may be done in any case where liability could be asserted in an original action brought against the plaintiff. Any suit which the defendant could maintain as an independent cause of action is by this act made a proper subject matter for a counterclaim. *Coats v. Milner*, 134 Ark. 311, 203 S.W. 701 (1918).

Landowners could not set off against drainage assessments past-due bonds and coupons on the ground that setoffs were allowed before the drainage statute was effective, since a proceeding to collect the assessments was not an action for the recovery of money. *State ex rel. Murphy v. Cherry*, 188 Ark. 664, 67 S.W.2d 1024 (1934).

Notwithstanding this section, an action for the establishment of child support is not an action for the recovery of money, and thus it was error for the court to grant obligor parent a setoff against a child support award for a debt she paid. *Chaisson v. Ragsdale*, 323 Ark. 373, 914 S.W.2d 739 (1996).

Banks.

A depository in an insolvent bank is not entitled to have his deposit set off against his paper that had not matured at the time of the bank's insolvency. *Steelman v. Atchley*, 98 Ark. 294, 135 S.W. 902 (1911).

Where, after the death of intestate, his administratrix deposited funds in a bank to which intestate was indebted at the time of his death, the bank was not entitled to set off the deposit against the intestate. *Cleveland County Bank v. Doster*, 176 Ark. 1163, 5 S.W.2d 334 (1928).

The law of setoff as between an insolvent bank and its creditors applies only to concurrent liabilities on the date of its insolvency. *Stokes v. Home Life Ins. Co.*, 187 Ark. 972, 63 S.W.2d 657 (1933).

Conversion.

In a Chapter 7 case, creditor converted proceeds from the sale of a vacuum unit because creditor acted as a broker in finding a buyer and creditor breached its fiduciary duty by failing to turn over the proceeds to debtor; setoff was not available because it was prohibited by Arkansas law, the debts were not mutual, and setoff was prohibited on equitable grounds

since it would have violated the automatic stay. *Natl Hydro-Vac Indus. Servs., L.L.C. v. Fed. Signal Corp.* (In re *Natl Hydro-Vac Indus. Servs., L.L.C.*), 314 B.R. 753 (Bankr. E.D. Ark. 2004).

Evidence.

Where a defendant sought to set off a note endorsed to him after the suit was commenced, it may be shown by parol evidence that the note was assigned before the suit was commenced, since the endorsement related back to that time. *Lofton v. King*, 185 Ark. 421, 47 S.W.2d 578 (1932).

Instructions.

In an action for assault, it was proper to instruct that if the damages to which the defendant was entitled on a counterclaim for slander equaled or exceeded the amount of damages which the plaintiff was entitled to recover on account of the assault the jury should find for the defendant. *Collier v. Thompson*, 180 Ark. 695, 22 S.W.2d 562 (1929).

Judgment.

A judgment may be used as a setoff against another judgment or claim founded on contract. *Milner v. Camden Lumber Co.*, 74 Ark. 224, 85 S.W. 234 (1905).

Open Accounts.

The assignee of an open account takes subject to all rights of setoff then held by the debtor against the assignor. *Jones v. Model Laundry*, 180 Ark. 616, 22 S.W.2d 19 (1929).

Property.

The seller of goods cannot, after their delivery to the buyer, retake possession of them after death of buyer, and then, when sued for their value by the buyer's administrator, set off debts due the seller. *Henderson Co. v. Webster*, 178 Ark. 553, 11 S.W.2d 463 (1929).

One sued by an executor for wrongful conversion of property of the estate may not set off claim that he may have against the estate. *Ouachita Valley Ref. Co. v. Webster*, 178 Ark. 845, 12 S.W.2d 779 (1929).

Remand.

A decree remanding a case with directions in accordance with the opinion, holding that the lower court erred in directing

appropriation of the proceeds of the landlord's sale of the crop to tenant's debt for prior years because there was no lien on the crop to secure the indebtedness, was held not to prevent either party from stating an account or pleading any claim they may have. *Henry v. Irby*, 175 Ark. 614, 1 S.W.2d 49 (1927).

Statute of Nonclaim.

Person who acquired note after decedent's death could not set off note if barred

by statute of nonclaim. *Watkins v. Parker*, 97 Ark. 492, 134 S.W. 1187 (1911).

A setoff or recoupment may be made under this section whether barred by the nonclaim statute or the general statute of limitations. *Hill v. Barnes*, 208 Ark. 432, 186 S.W.2d 675 (1945).

Cited: *Morris v. City of Fort Smith*, 224 Ark. 722, 276 S.W.2d 36 (1955); *Easley v. Inglis*, 233 Ark. 589, 346 S.W.2d 206 (1961).

16-63-207. Libel and slander.

(a)(1) In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose. It shall be sufficient to state generally that the defamatory matter was published or spoken concerning the plaintiff.

(2) If the allegation is not controverted in regard to judgments, it shall not be necessary to prove it on trial.

(b) In an action for libel or slander, the defendant may, in his or her answer, allege both the truth of the matter charged as defamatory and any mitigating circumstances, legally admissible in evidence, to reduce the amount of damages. Whether he or she proves the justification or not, he or she may give in evidence the mitigating circumstances.

History. Civil Code, §§ 143, 144; C. & M. Dig., §§ 1228, 1229; Pope's Dig., §§ 1452, 1453; A.S.A. 1947, §§ 27-1148, 27-1149.

RESEARCH REFERENCES

Ark. L. Rev. Legal Liability for the Exercise of Free Speech, 10 Ark. L. Rev. 155.

CASE NOTES

ANALYSIS

Defenses.
Privilege.

Defenses.

The defendant in an action of slander may plead and prove the truth of the

matter charged or other mitigating circumstances. *Axley v. Hammock*, 185 Ark. 939, 50 S.W.2d 608 (1932).

Privilege.

Privilege must be pleaded by answer. *Bradley v. State*, 171 Ark. 1083, 287 S.W. 387 (1926).

16-63-208. [Superseded.]

Publisher's Notes. This section was held to be superseded by ARCP 8 in *Borg-Warner Acceptance Corp. v. Kesterson*, 288 Ark. 611, 708 S.W.2d 606 (1986); *Griffin-Payne, Inc. v. Union Bank*, 289 Ark.

182, 710 S.W.2d 201 (1986). Section 16-63-208 was derived from Civil Code, § 149; C. & M. Dig., § 1233; Pope's Dig., § 1457; Acts 1983, No. 391, § 1; and A.S.A. 1947, § 27-1142.

16-63-209. Instrument for payment of money only — Sufficiency of pleading.

In an action or defense founded upon an instrument for the payment of money only, it shall be sufficient for a party to give a copy of the instrument and to state that there is due to him or her thereon from the adverse party a specified sum which he or she claims.

History. Civil Code, § 138; Acts 1871, § 1222; Pope's Dig., § 1446; A.S.A. 1947, No. 48, § 1 [138], p. 219; C. & M. Dig., § 27-1143.

CASE NOTES**ANALYSIS**

Accounts.
Affidavits.
Bonds.
Copy filed.
Deeds.
Exhibits.
Mortgage.
Pleadings.

Accounts.

Where an action is brought on an account, the account must be itemized and filed with the complaint, and where an itemized account is not filed, it is error for the court to overrule the defendant's motion to make the account more specific by giving the items. *Brooks v. International Shoe Co.*, 132 Ark. 386, 200 S.W. 1027 (1918).

In action on account for groceries in which purported itemized and verified statement only gave the dates of purchases, the general word "groceries" and the amounts of purchases in dollars and cents, defendant was entitled to statement of the particular items of groceries purchased upon motion to that effect. *Griffin v. Young*, 225 Ark. 813, 286 S.W.2d 486 (1956).

Court has the authority to require that a complaint be made more definite and certain by furnishing an itemized statement of the account. *Spears v. Miller*, 230 Ark. 36, 320 S.W.2d 942 (1959).

Affidavits.

In an action to enforce a mechanic's lien, the affidavit filed in circuit court is not the basis of the cause of action nor does it constitute the evidence of indebtedness on which the action is founded. *E.O. Barnett Bros. v. Wright*, 116 Ark. 44, 172 S.W. 254 (1914).

Bonds.

In action in circuit court on bond of administration where order of payment by probate court was filed as an exhibit, the exhibit is not part of the complaint, but merely evidence in support of the allegations of the complaint, the suit not being founded on the order of payment. *Euper v. State*, 85 Ark. 223, 107 S.W. 179 (1907).

Copy Filed.

Where a copy has been filed, the court may still compel the filing of the original. *Egan v. Tewksbury*, 32 Ark. 43 (1877); *Weaver v. Carnell*, 35 Ark. 198 (1879).

Deeds.

Copies of deeds filed with the pleadings are no part of the pleadings or of the evidence. *Richardson v. Williams*, 37 Ark. 542 (1881).

Exhibits.

In chancery, an exhibit is part of the record, and, if it is the foundation of the suit, it will explain, and even control, the averments in the complaint. *Beavers v. Baucum*, 33 Ark. 722 (1878); *American Freehold Land Mtg. Co. v. McManus*, 68 Ark. 263, 58 S.W. 250 (1900).

In a suit in equity, exhibits to the pleadings are considered as parts thereof and the exhibits constitute the foundation of the action. *City of El Dorado v. Citizens' Light & Power Co.*, 158 Ark. 550, 250 S.W. 882 (1923).

In an action at law, not founded on an instrument for the payment of money, the exhibit does not constitute the foundation of the action so as to control the allegations of the complaint. *Central Kan. Milling Co. v. Patterson*, 161 Ark. 480, 256 S.W. 847 (1923).

In determining the sufficiency of the complaint on appeal from default judg-

ment at law, an exhibit thereto contradicting the complaint will not be considered. *Home Indem. Co. v. Bobo*, 186 Ark. 636, 55 S.W.2d 81 (1932).

Mortgage.

In a suit for personal property claimed under a mortgage, the mortgage is no part

of the complaint, though filed with it. *Chamblee v. Stokes*, 33 Ark. 543 (1878).

Pleadings.

The substance of the writing should be stated in the pleadings. *Nordman v. Craighead*, 27 Ark. 369 (1872).

16-63-210. Actions for recovery of real property.

In an action for the recovery of real property, the property must be described in the complaint with such convenient certainty as to enable an officer holding an execution to identify it.

History. Civil Code, § 145; C. & M. Dig., § 1230; Pope's Dig., § 1454; A.S.A. 1947, § 27-1145.

CASE NOTES

Defective Description.

When the description of land in complaint for recovery of land is not sufficient

to identify land, the complaint does not state a cause of action. *Flanagan v. Ray*, 149 Ark. 411, 232 S.W. 600 (1921).

16-63-211. [Superseded.]

A.C.R.C. Notes. The Supreme Court of Arkansas stated in a Per Curiam of Nov. 24, 1986, that this section, concerning filing of deeds, etc., with pleadings, was deemed superseded by the Arkansas

Rules of Civil Procedure. The section was derived from Civil Code, § 148; Acts 1871, No. 48, § 1 [148], p. 219; C. & M. Dig., § 1223; Pope's Dig., § 1447; A.S.A. 1947, § 27-1144.

16-63-212. Presumptions and matters of judicial notice.

Neither presumptions of law nor matters of which judicial notice is taken need be stated in a pleading.

History. Civil Code, § 137; C. & M. Dig., § 1221; Pope's Dig., § 1445; A.S.A. 1947, § 27-1141.

RESEARCH REFERENCES

Ark. L. Rev. Use of Presumptions in Arkansas, 4 Ark. L. Rev. 128.

CASE NOTES

ANALYSIS

Rules.
Townships.

Rules.

The Supreme Court will take judicial notice of rules promulgated by the board

of control of the agricultural experiment station, and they need not be alleged in the indictment or proved. *Palmer v. State*, 137 Ark. 160, 208 S.W. 436 (1919).

Townships.

Courts should take judicial knowledge of the townships within their territorial

jurisdiction and that a particular town- the county. *Saint Louis, I.M. & S. Ry. v. ship is within a certain judicial district of State*, 68 Ark. 561, 60 S.W. 654 (1901).

16-63-213. Irrelevant or redundant matter.

If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby, at the cost of the party whose pleading contained it.

History. Civil Code, § 140; C. & M. Dig., § 1225; Pope's Dig., § 1449; A.S.A. 1947, § 27-1154.

CASE NOTES

Pleadings. may properly strike it from the files. When a pleading is replete with irrelevant and scandalous matter, the court *Hershby v. MacGreevy*, 46 Ark. 498 (1885).

16-63-214. Variance between pleading and proof.

(a)(1) No variance between the allegation in a pleading and the proof is to be deemed material unless it has actually misled the adverse party to his or her prejudice in maintaining his or her action or defense upon the merits.

(2) Whenever it is alleged that a party has been so misled, that fact must be shown to the satisfaction of the court, and it must also be shown in what respect he or she has been misled. Thereupon, the court may order the pleading to be amended upon such terms as may be just.

(b) Where the variance between the allegation in the pleading and the proof is not material, the court may direct the fact to be found according to the evidence, and may order an immediate amendment without costs.

(c) Where, however, the allegation of the claim or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance within this section, but a failure of proof.

History. Civil Code, §§ 150-152; C. & M. Dig., §§ 1234-1236; Pope's Dig., §§ 1458-1460; A.S.A. 1947, §§ 27-1155 — 27-1157.

CASE NOTES

ANALYSIS

Affirmative defenses.
Conforming to evidence.
Continuance.
De novo review.
Discretion of court.
Materiality of variance.
Misleading amendment.
New trial.

Parties.
Verdict.

Affirmative Defenses.

In an action to quiet title, it was not error to exclude evidence proffered on issue of adverse possession since the affirmative defense of adverse possession for seven years should be asserted by counterclaim to quiet title on that ground and

affirmative defenses and counterclaims must be specifically stated in addition to a general denial. *Stolz v. Franklin*, 258 Ark. 999, 531 S.W.2d 1 (1975).

Conforming to Evidence.

Where no objection is made to evidence, the complaint must be considered as if amended so as to conform to it. *Hanks v. Harris*, 29 Ark. 323 (1874); *Healy v. Conner*, 40 Ark. 352 (1883).

An answer that is indefinite may be amended after verdict, so as to conform to proof. *Trippe & Son v. DuVal*, 33 Ark. 811 (1878). See also *Sorrels v. Self*, 43 Ark. 451 (1884); *Caldwell v. Meshew*, 53 Ark. 263, 13 S.W. 761 (1890).

Additional pleadings to correspond with the issues established by the evidence may be filed after the case has been argued to the jury. *Burke v. Snell*, 42 Ark. 57 (1883); *Gainus v. Cannon*, 42 Ark. 503 (1884); *McMurray v. Boyd*, 58 Ark. 504, 25 S.W. 505 (1894).

Where both parties direct their evidence to some issue, a defective complaint will be considered as amended to conform to proof. *Saint Louis, A. & T. Ry. v. Triplett*, 54 Ark. 289, 15 S.W. 831, 16 S.W. 266 (1891).

On appeal, the court may permit amendments to be made to the petition or statement of the plaintiff's cause of action so as to make it more definite and certain, providing that the amendments do not change the cause of action. *Freeman v. Lazarus*, 61 Ark. 247, 32 S.W. 680 (1895).

Where a replevin suit instituted by a husband was tried on the theory that he was suing on behalf of his wife, his affidavit was amendable on appeal to the circuit court so as to show that the property was his wife's and that he was suing as her agent. *Gunter v. Earnest*, 68 Ark. 180, 56 S.W. 876 (1900).

It is not error to permit complaint to be amended to conform to proof introduced without objection. *Citizens Fire Ins. Co. v. Lord*, 100 Ark. 212, 139 S.W. 1114 (1911).

Where defendant did not contend that it was misled by a variance between the evidence and the complaint, did not claim surprise, or ask for a continuance, it was not error to permit amendment of the complaint some weeks after the trial and after plaintiff had filed her brief. *Old Am. Life Ins. Co. v. Harvey*, 242 Ark. 720, 415 S.W.2d 66 (1967).

Where an oral collateral contract was not pleaded but was raised in response to plaintiff's request for admission of fact, and where the court permitted the introduction of evidence over objections that the issue was not pleaded, the effect is to treat the pleadings as amended to conform to the proof. *Bonds v. Littrell*, 247 Ark. 577, 446 S.W.2d 672 (1969).

In a quiet title case, it was not error for the court to admit in evidence muniments of title not embraced by the pleadings where no prejudice to the objecting party was shown and the objecting party rejected an offer from the court of an opportunity to further investigate the proffered evidence. *Rinke v. Shackelford*, 248 Ark. 941, 455 S.W.2d 83 (1970).

There was no error where the allegations of the appellee's counterclaim were sufficient to permit the introduction of the testimony relating to breach of contract. *Royal Serv. Co. v. Whitehead Constr. Co.*, 254 Ark. 234, 492 S.W.2d 423 (1973).

Continuance.

When the testimony constitutes such a variance that the defendant is taken by surprise, he should be granted a continuance to enable him to prepare new defense to meet the issue. *Choctaw, O. & G.R.R. v. Donavan*, 71 Ark. 197, 72 S.W. 48 (1903).

Party claiming prejudice by reason of variance between pleading and proof may obtain continuance upon request, and other party may then be permitted to amend upon just terms. *National Cash Register Co. v. Holt*, 193 Ark. 617, 101 S.W.2d 441 (1937).

Party not pleading surprise and not asking for continuance cannot claim to have been prejudiced by variance between pleading and proof. *National Cash Register Co. v. Holt*, 193 Ark. 617, 101 S.W.2d 441 (1937).

Admission of evidence objected to on ground that it tended to establish a defense not alleged in the answer was held not error where court offered to continue the case and the offer was declined. *Bradley Adv. Inc. v. Froug Stores, Inc.*, 193 Ark. 639, 101 S.W.2d 789 (1937).

To be entitled to a continuance because of the filing of a cross-complaint on day of trial, plaintiffs must show that they had been misled to their prejudice and in what respect they had been misled. *Williams v.*

Bullington, 195 Ark. 253, 111 S.W.2d 507 (1937).

Where cross-complaint to action for purchase price of mules, alleging that plaintiffs refused to deliver the mules and defendant was therefore entitled to a credit, was filed when case was called for trial, plaintiffs were held not entitled to a continuance since they were bound to know when they filed their complaint that they had burden to show sale and delivery of mules. *Williams v. Bullington*, 195 Ark. 253, 111 S.W.2d 507 (1937).

De Novo Review.

In a de novo review of an equity case, the Court of Appeals treats the pleadings as amended to conform with the proof presented. *Sorrells v. Bailey Cattle Co.*, 268 Ark. 800, 595 S.W.2d 950 (Ark. App. 1980).

Discretion of Court.

In allowing amendments of pleadings to conform to the proof, a large discretion is vested in the trial court and its action will be sustained upon appeal unless there has been a manifest abuse of discretion and the complaining party has been materially prejudiced thereby. *Rucker v. Martin, Phillips & Co.*, 94 Ark. 365, 126 S.W. 1062 (1910).

It was not an abuse of discretion to permit the plaintiff to amend his complaint to conform to the proof where it did not appear that the defendant was surprised or otherwise prejudiced by such amendment. *Oak Leaf Mill Co. v. Cooper*, 103 Ark. 79, 146 S.W. 130 (1912).

In an action brought to rescind sale contract, the trial court did not abuse its discretion in allowing vendors to amend pleadings, where purchasers were offered a continuance if they were taken by surprise. *Bates v. Simmons*, 259 Ark. 657, 536 S.W.2d 292 (1976).

Materiality of Variance.

Materiality of variance is not determined, as at common law, by the incoherence of the two statements on their face, but it must be shown by the party alleging the variance, that he has been misled to his prejudice. *Molen v. Orr*, 44 Ark. 486 (1884).

So long as the claim proved is within the general scope and meaning of the pleadings, the variance cannot amount to a

failure of proof. *Molen v. Orr*, 44 Ark. 486 (1884).

Evidence sufficient to find a total variance amounting to a failure of proof. *Saint Louis, I.M. & S. Ry. v. State*, 59 Ark. 165, 26 S.W. 824 (1894) (decision under prior law).

Misleading Amendment.

One claiming to have been misled by an amendment must show in what manner. *King v. Caldwell*, 26 Ark. 405 (1871).

New Trial.

Where a complaint was without objection, treated on a former trial, as amended to conform to the proofs adduced by the plaintiff, the defendant, in a second trial, cannot object to the evidence as being without the issues if he makes no demand that the pleadings be conformed to the evidence in the first trial. *Western Coal & Mining Co. v. Buchanan*, 88 Ark. 7, 114 S.W. 694 (1908).

Parties.

A suit should not be dismissed for want of parties, if plaintiff will amend. *Benjamin v. Loughborough*, 31 Ark. 210 (1876).

A mistake in the name of a party may be corrected. *Beavers v. Baucum*, 33 Ark. 722 (1878).

Where a complaint shows that the plaintiff has no cause of action, it cannot be amended by making others plaintiff who have. *State v. Rottaken*, 34 Ark. 144 (1879).

Where a complaint against a bank for the conversion of a note sent to it for collection bore the name of the defendant bank's cashier as principal and an unidentified person as surety, the plaintiff was entitled to recover upon proof that defendant bank was guilty of conversion, though the evidence showed that the note was signed by another individual as surety, that is, unless defendant bank could show that it was misled by this variance. *First Nat'l Bank v. First Nat'l Bank*, 159 Ark. 517, 252 S.W. 594 (1923).

Courts will not allow amendments to be made which change the parties to the action unless there is something in the record to authorize the amendment. *Fencing Dist. No. 6 v. Missouri Pac. Ry.*, 180 Ark. 488, 21 S.W.2d 959 (1929).

In suit to enforce materialman's lien, dismissal as to corporate defendant whose name was not properly alleged in the

complaint in that the abbreviation "Inc." was omitted, where return of service of summons showed it was sued as a corporation, was held error since the omission was not a fatal defect. *Central Supply Co. v. Wren*, 198 Ark. 1090, 133 S.W.2d 632 (1939).

When both of plaintiff's pleadings, a complaint and amended complaint, were taken together and both considered in accordance with the principle of construing pleadings liberally and giving them every reasonable intendment, the court felt all defendants were aware of the fact that plaintiff was attempting to hold them liable and it was of no avail that the statement was made out in one name when the correct name was otherwise.

Stroud v. M.M. Barksdale Lumber Co., 229 Ark. 111, 313 S.W.2d 376 (1958).

Verdict.

Supreme Court will not disturb verdict on account of variance between pleading and evidence, where pleading might have been amended at the trial, in accordance with the proof. *Chamblee v. McKenzie*, 31 Ark. 155 (1876).

Failure to allege value is cured by verdict. *Jefferson v. Hale*, 31 Ark. 286 (1876).

Cited: *Union Motor Co. v. Turbiville*, 223 Ark. 92, 264 S.W.2d 592 (1954); *Old Am. Life Ins. Co. v. Harvey*, 242 Ark. 720, 415 S.W.2d 66 (1967); *Wharton v. Bray*, 250 Ark. 127, 464 S.W.2d 554 (1971); *Miller v. Hardwick*, 267 Ark. 841, 591 S.W.2d 659 (Ct. App. 1979).

16-63-215. [Superseded.]

A.C.R.C. Notes. The Supreme Court of Arkansas stated in a Per Curiam of Nov. 24, 1986, that this section, concerning the court's authority with respect to pleadings, was deemed superseded by the Ar-

kansas Rules of Civil Procedure. The section was derived from Civil Code, § 155; C. & M. Dig., §§ 1239-1242; Pope's Dig., §§ 1463-1466; Acts 1975, No. 204, § 1; A.S.A. 1947, § 27-1160.

16-63-216. Constructive service — Proof of allegations.

The statements of the complaint, as against a defendant who was constructively summoned and who has not appeared, except those which are to his or her benefit, shall not be taken as true but are to be established by proof. But where the plaintiff files with the complaint his or her own affidavit stating that any of the allegations thereof recited in the affidavit are true, and known to be so by the defendant, and that they cannot be proved or shown otherwise than by his or her answer, so far as the affiant knows or believes, such allegations, unless denied by the answer, shall be taken as true.

History. Civil Code, § 444; C. & M. Dig., § 6260; Pope's Dig., § 8216; A.S.A. 1947, § 27-1153.

16-63-217. Depositions.

(a) Officers and stenographers taking depositions shall prepare an original and two (2) carbon copies of the depositions at the time of transcribing. The officer shall be allowed a reasonable compensation to be fixed by the court and taxed as cost for this service.

(b) The plaintiff and defendant shall each be furnished with one (1) of these copies for their files, and the original shall be filed and retained in the office of the clerk as set out in § 16-63-202.

History. Acts 1915, No. 290, § 18; C. & M. Dig., § 1186; Pope's Dig., § 1408; A.S.A. 1947, § 27-1104.

CASE NOTES

Cited: Gregory v. Rubel, 184 Ark. 55, 41 S.W.2d 771 (1931).

16-63-218. Original papers not removed.

No original pleading, motion, or deposition shall be permitted to be taken from the office of the clerk of the court unless by the order of the court or judge in each specific instance, but all original papers shall remain in the office subject to the inspection of all interested persons and their attorneys.

History. Acts 1915, No. 290, § 18; C. & M. Dig., § 1186; Pope's Dig., § 1408; A.S.A. 1947, § 27-1104.

CASE NOTES

Removal of Papers.

It is not error for an attorney to remove the papers for the purpose of mailing

them to the chancellor. Gregory v. Rubel, 184 Ark. 55, 41 S.W.2d 771 (1931).

16-63-219. Fee for discovery of medical records.

A party in a civil action who seeks discovery of medical records from a physician or a hospital may be required by the court to pay the person from whom discovery is sought a reasonable fee for processing the records. The fee for processing the records shall not be limited to the expense of copying the records.

History. Acts 1987, No. 359, § 1.

16-63-220. Reply to action brought by prisoner.

(a)(1)(A) Any defendant may waive the right to reply to any action brought by an incarcerated person, defined for purposes of this section as a person who has been convicted of a crime and is incarcerated for that crime or is being held in custody for trial or sentencing, under Section 1979 of the Revised Statutes of the United States, 42 U.S.C. § 1983, or any other federal law or state law.

(B) Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint.

(2) No relief shall be granted to the plaintiff unless a reply has been filed.

(b) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

History. Acts 1997, No. 286, § 1.

SUBCHAPTER 3 — JOINDER

SECTION.

16-63-301. Misjoinder.

16-63-302. Failure to join actions —
Costs.

16-63-301. Misjoinder.

(a) At any time before the defense, the court shall on motion of the defendant strike out of the complaint any cause or causes of action improperly joined with others.

(b) All objections to the misjoinder of causes of action shall be deemed to be waived unless made as provided in subsection (a) of this section, and all errors in the decisions of the court thereon are waived unless excepted to at the time.

History. Civil Code, §§ 103, 104; C. & §§ 1286, 1287; A.S.A. 1947, §§ 27-1302, M. Dig. §§ 1078, 1079; Pope's Dig., 27-1303.

CASE NOTES

ANALYSIS

Objection.

Parties.

Proper joinder.

Waiver.

Objection.

The objection that a complaint is multifarious should be raised by a motion to strike. *Clements v. Lampkin*, 34 Ark. 598 (1879); *Waldo v. Thweatt*, 64 Ark. 126, 40 S.W. 782 (1897); *Jett v. Theo. Maxfield Co.*, 80 Ark. 167, 96 S.W. 143 (1906).

In absence of objection, court has authority to proceed to try causes improperly joined. *Burgett v. Allen*, 54 Ark. 560, 16 S.W. 573 (1891).

In the absence of objection, court has discretion, in the interest of orderly proceeding and to prevent confusion of issues, to compel plaintiff to elect to prosecute only such causes as might properly be joined, and if plaintiff refuses to make election, to dismiss the complaint. *Burgett v. Allen*, 54 Ark. 560, 16 S.W. 573 (1891).

Parties.

A paragraph in a complaint introducing an unnecessary party may be stricken out. *Lyman v. Corwin*, 27 Ark. 580 (1872).

Proper Joinder.

Motion to dismiss is not proper remedy

for multifarious complaint, but the motion should be to strike the causes of action improperly joined. *Ashley v. City of Little Rock*, 56 Ark. 391, 19 S.W. 1058 (1892).

Persons holding lands which are at issue in the case are properly joined as parties. *Hill v. Dade*, 68 Ark. 409, 59 S.W. 39 (1900).

Waiver.

If there is no motion to strike out, the error is waived. *Terry v. Rosell*, 32 Ark. 478 (1877); *Riley v. Norman*, 39 Ark. 158 (1882).

A misjoinder of causes of action is waived by failure to move to strike out the causes improperly joined. *Riley v. Norman*, 39 Ark. 158 (1882); *Turner v. Alexander*, 41 Ark. 254 (1883); *Lake v. Combs*, 84 Ark. 21, 104 S.W. 544 (1907).

Where the defendant files an answer to an amended complaint which changes the cause of action, without moving to strike out the amended complaint, he will be held to have waived any objection to the amended complaint. *Kansas City S. Ry. v. Tonn*, 102 Ark. 20, 143 S.W. 577 (1912).

Where complaint in suit was amended by setting up additional cause of action, it was held there was no misjoinder of actions and parties since if separate suits had been filed they could have been con-

solidated for trial, and if improperly joined, right to object had been waived. *Christopher v. Wasson*, 198 Ark. 297, 128 S.W.2d 1012 (1939).

If there is a misjoinder it is waived by failure to file motion to strike out. *Cooper v. Cooper*, 225 Ark. 626, 284 S.W.2d 617 (1955).

Although the defendant may have waived misjoinder of causes of action by filing an answer to the original complaint

instead of a motion to strike, an amended complaint filed subsequently to the filing of the answer and containing a misjoinder was subject to an appropriate motion to quash. *Widmer v. Wood*, 243 Ark. 457, 420 S.W.2d 828 (1967).

Cited: *Fordyce v. Nix*, 58 Ark. 136, 23 S.W. 967 (1893); *Citizens Bank v. Commercial Nat'l Bank*, 107 Ark. 142, 155 S.W. 102 (1913).

16-63-302. Failure to join actions — Costs.

When any plaintiff brings in the same court several suits against the same defendant or defendants for causes of action that may be joined, the plaintiff shall recover only the costs of one (1) action. The costs of the other actions shall be adjudged against him or her unless sufficient reason appears to the court for bringing several actions.

History. Rev. Stat., ch. 116, § 133; C. & M. Dig., § 1082; Pope's Dig., § 1290; A.S.A. 1947, § 27-1306.

SUBCHAPTER 4 — CONTINUANCE OR DISMISSAL

SECTION.

- 16-63-401. Continuance after amendment.
- 16-63-402. Continuance for absence of evidence or witness.
- 16-63-403. No continuance until costs paid.
- 16-63-404. Dismissal in vacation.

SECTION.

- 16-63-405. [Superseded.]
- 16-63-406. Stay of proceedings in which party or attorney is a member or an employee of the General Assembly.
- 16-63-407. Striking causes of action.

Cross References. Continuance in justice of peace courts, § 16-19-603.

Effective Dates. Acts 1871, No. 48, § 1 [890]: effective 90 days after passage.

Acts 1887, No. 18, § 2: effective on passage.

Acts 1981, No. 312, § 5: became law without Governor's signature, Mar. 5, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that this Act is necessary to clarify the authority granted by the legislative branch of government to the judicial branch of government, and that this Act is in keeping with the separation of powers provision of Section 2 of Article 4 of the Arkansas Constitution, and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate

preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1997, No. 1354, § 51: Apr. 14, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that this act affects the method of selection of alternate members of the Legislative Council and Legislative Joint Auditing Committee and that this act is immediately necessary for proper continuity and efficiency in State government. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the

expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the

veto is overridden, it shall become effective on the date the last house overrides the veto."

RESEARCH REFERENCES

ALR. Continuance conditioned on applicants' payment of costs incurred by other party. 9 ALR 4th 1144.

C.J.S. 17 C.J.S., Continuances, § 1 et seq.

16-63-401. Continuance after amendment.

When either party amends any pleading or proceeding and the court is satisfied by affidavit or otherwise that the adverse party could not be ready for trial in consequence thereof, a continuance may be granted to some day in the same term or to another term of court.

History. Civil Code, § 157; C. & M. Dig., § 1244; Pope's Dig., § 1468; A.S.A. 1947, § 27-1402.

CASE NOTES

ANALYSIS

Discretion of court.

Evidence at variance with pleading.

Grant of continuance.

Discretion of Court.

Granting of continuances is within sound discretion of court, and unless the discretion appears clearly to have been abused, judgment will not be set aside. Fort Smith & Van Buren Dist. v. Scott, 103 Ark. 405, 147 S.W. 440 (1912).

Where answer was amended and plaintiff's attorney asked court for permission to continue the case, but record did not show that any reason was stated for the continuance, it cannot be said that the court abused its discretion in denying continuance. Lewisville Light & Water Co. v. Lester, 109 Ark. 545, 160 S.W. 861 (1913).

The granting or refusing of a motion for continuance is addressed to the sound discretion of the trial court and will not be reversed unless the trial court abuses its

discretion. Perez v. State, 236 Ark. 921, 370 S.W.2d 613 (1963).

Evidence at Variance with Pleading.

Where evidence at variance with complaint was introduced by plaintiff over objection of defendant, it was error to proceed with trial without granting defendant a continuance. Choctaw, O. & G.R.R. v. Donovan, 71 Ark. 197, 72 S.W. 48 (1903).

Grant of Continuance.

Where complaint as amended changed the issues formulated by the original pleadings so as to surprise the defendant, the court erred in not granting a continuance or postponement to allow defendant to prepare for trial. Saint Louis, I.M. & S. Ry. v. Power, 67 Ark. 142, 53 S.W. 572 (1899).

Permitting plaintiff to amend complaint upon physician's testimony was held proper where defendant's attorney did not claim surprise and did not ask for a postponement. Missouri Pac. Transp. Co. v. Brown, 193 Ark. 304, 99 S.W.2d 245 (1936).

16-63-402. Continuance for absence of evidence or witness.

(a) A motion to postpone a trial on account of the absence of evidence shall, if required by the opposite party, be made only upon affidavit showing the materiality of the evidence expected to be obtained and

that due diligence has been used to obtain it. If the motion is for an absent witness, the affidavit must show what facts the affiant believes the witness will prove and not merely show the effect of the facts in evidence, that the affiant believes them to be true, and that the witness is not absent by the consent, connivance, or procurement of the party asking the postponement.

(b) If thereupon the adverse party will admit that on trial the absent witness, if present, would testify to the statement contained in the application for a continuance, then the trial shall not be postponed for that cause. However, the opposite party may controvert the statement so set forth in the motion for continuance by evidence.

History. Civil Code, § 340; Acts 1879, C. & M. Dig., § 1270; Pope's Dig., § 1494; No. 26, § 1, p. 26; 1887, No. 18, § 1, p. 19; A.S.A. 1947, § 27-1403.

CASE NOTES

ANALYSIS

Absent witness.

—Admission by adverse party.

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Appellate review.

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Absent Witness.

Affidavit and motion insufficient to warrant continuance for absent witness. *Richie v. State*, 85 Ark. 413, 108 S.W. 511 (1908); *Nix v. State*, 124 Ark. 599, 187 S.W. 308 (1916); *State ex rel. Greene County Bar Ass'n v. Huddleston*, 173 Ark. 686, 293 S.W. 353 (1927); *Estes v. State*, 180 Ark. 656, 22 S.W.2d 172 (1929); *Weaver v. State*, 185 Ark. 147, 46 S.W.2d 37 (1932); *Meyers v. State*, 185 Ark. 892, 50 S.W.2d 234 (1932); *Huddleston v. State*, 186 Ark. 1197, 53 S.W.2d 1 (1933); *Lynch v. State*, 188 Ark. 831, 67 S.W.2d 1011 (1934); *Shank v. State*, 189 Ark. 243, 72 S.W.2d 519 (1934); *Cathey v. State*, 194 Ark. 1074, 110 S.W.2d 17 (1937); *Carter v. State*, 196 Ark. 746, 119 S.W.2d 913 (1938); *Morgan v. Austin*, 206 Ark. 235, 174 S.W.2d 562 (1943); *Bryant v. State*, 208 Ark. 192, 185 S.W.2d 280 (1945).

A motion which shows that the affiant has not been able to communicate with the witness and therefore did not know

what she would testify is insufficient. *State Life Ins. Co. v. Ford*, 101 Ark. 513, 142 S.W. 863 (1912).

Where defendant moved for continuance in order to procure depositions or attendance of absent witnesses, the acts of diligence used in procuring the testimony should have been set forth in the motion. *Lee v. State*, 145 Ark. 75, 223 S.W. 373 (1920).

Motion for continuance on account of absence of witness beyond jurisdiction of court should show how attendance of witness could be had at next term of court. *Freeman v. State*, 150 Ark. 387, 234 S.W. 267 (1921).

A motion for continuance based on the absence of some particular witness must, to be sufficient, state that the witness is not absent by the consent, connivance, or procurement of the moving party. *Davis v. State*, 155 Ark. 245, 244 S.W. 750 (1922).

Because defendant had not located a witness to testify by time of trial and was basically requesting an open-ended continuance to search for some unnamed witness which he might not be able to afford, and because defendant waited until after the trial was in progress to move for a continuance and then filed no affidavit to establish the materiality of the anticipated evidence, trial court's denial of the motion for a continuance was not an abuse of discretion. *Hill v. State*, 321 Ark. 354, 902 S.W.2d 229 (1995).

—Admission by Adverse Party.

It was not an abuse of discretion to refuse a continuance for an absent wit-

ness where the adverse party admitted that the witness, if present, would testify as stated in the application for continuance. *Inter-Ocean Cas. Co. v. Copeland*, 184 Ark. 648, 43 S.W.2d 65 (1931); *Ozan Graysonia Lumber Co. v. Ward*, 188 Ark. 557, 66 S.W.2d 1074 (1934).

This section held not applicable where plaintiffs admitted that witness, if present, would testify to statement contained in motion for continuance made by one defendant, but other defendants objected to statement and upon its introduction stated in open court they did not believe the witness would so testify. *Cleft v. Jordan*, 205 Ark. 245, 168 S.W.2d 403 (1943).

In action to recover value of crop, refusal to grant plaintiff's motion for continuance was held not to show abuse of wide discretion resting in trial judge. *Morgan v. Austin*, 206 Ark. 235, 174 S.W.2d 562 (1943).

—Affidavits.

Statement of facts which are expected to be proved by absent witness cannot be contradicted by counter affidavits or other testimony for purpose of defeating a motion for continuance. *Lane v. State*, 67 Ark. 290, 54 S.W. 870 (1899).

A motion for continuance because of the absence of a certain witness was properly overruled where it was not accompanied by the required affidavit. *Smith v. State*, 181 Ark. 592, 26 S.W.2d 899 (1930); *Brooks v. State*, 308 Ark. 660, 827 S.W.2d 119 (1992); *Dansby v. State*, 319 Ark. 506, 893 S.W.2d 331 (1995).

In order to obtain a continuance because of the absence of a witness, it is necessary that the movant support his motion by an affidavit stating what facts affiant believes the witness will prove and not merely the effect of the facts in evidence. *Venable v. State*, 260 Ark. 201, 538 S.W.2d 286 (1976).

Where no affidavit accompanied defendant's motion for a continuance due to an absent witness, the motion was properly denied. *King v. State*, 314 Ark. 205, 862 S.W.2d 229 (1993); *Marshall v. State*, 316 Ark. 753, 875 S.W.2d 814 (1994).

This section requires the presence of an affidavit in order to justify a continuance due to a missing witness. *Cloird v. State*, 314 Ark. 296, 862 S.W.2d 211 (1993).

The courts have required that the mov-

ant for a continuance show by affidavit the likelihood of procuring the absent witnesses. *Landreth v. State*, 331 Ark. 12, 960 S.W.2d 434 (1998).

In an attempted capital murder case, the court did not err by denying defendant's motion for a continuance where, by omitting the affidavit, defendant failed to show his diligence in attempting to locate the two missing witnesses; further, without the expected testimony of the missing witnesses and those witnesses that he had not yet hired, defendant could not demonstrate that he was prejudiced by the denial of the continuance. *Clark v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 516 (Sept. 23, 2004).

Appellate Review.

A trial court's denial of motion for a continuance will not be reversed absent a clear abuse of discretion, and the defendant has the burden of showing an abuse of discretion. *Marshall v. State*, 316 Ark. 753, 875 S.W.2d 814 (1994).

Criminal Cases.

This section is void insofar as it will deny a person accused of a crime the use of process to bring witnesses before the court in criminal prosecutions. *Graham v. State*, 50 Ark. 161, 6 S.W. 721 (1887).

In criminal cases, continuances rest within the sound discretion of the court, and an abuse of that discretion must be shown. *Wilson v. State*, 188 Ark. 846, 68 S.W.2d 100 (1934).

An accused is entitled to compulsory process to compel the attendance of witnesses and this means the right to a delay until witnesses may be had at the trial, when they are within the jurisdiction of the court, in all cases wherein the authority and power of the court has been properly invoked. *Carter v. State*, 196 Ark. 746, 119 S.W.2d 913 (1938).

Specific method provided by this section must be followed substantially by one who would invoke the power and authority of the court to compel the attendance of witnesses. *Carter v. State*, 196 Ark. 746, 119 S.W.2d 913 (1938).

A person is not entitled to an indefinite continuance simply because a potential witness cannot be located; the elements of the diligence of the defense and the cooperation, or lack of it, on the part of the state are highly relevant in such cases, as

is the likelihood of the movant ever procuring the witness. *Doles v. State*, 280 Ark. 299, 657 S.W.2d 538 (1983).

In murder prosecution, defendant was not entitled to indefinite continuance nor to have state admit veracity of hearsay statement of unavailable witness, where the state had tried and failed to locate the witness and there was no basis for believing that she would ever be located. *Doles v. State*, 280 Ark. 299, 657 S.W.2d 538 (1983).

Where a party has missing witnesses or other absence of evidence, and moves for a continuance pursuant to ARCrP 27.3, the filing of an affidavit by the movant is required under subsection (a) of this section. *Wilson v. State*, 320 Ark. 142, 895 S.W.2d 524 (1995).

Where state objected to continuance at trial, and defendant filed no affidavits in support of his motion, trial court did not abuse its discretion in denying defendant's request for continuance. *Griffin v. State*, 322 Ark. 206, 909 S.W.2d 625 (1995); *Travis v. State*, 328 Ark. 442, 944 S.W.2d 96 (1997).

Discretion.

The granting or refusing of a continuance is within the sound discretion of the trial court. *Supreme Lodge Knights of Pythias v. Robbins*, 70 Ark. 364, 67 S.W. 758 (1902); *Missouri P.R.R. v. Berry*, 191 Ark. 1165, 83 S.W.2d 531 (1936).

No abuse of court's discretion found in denying motion for continuance. *Brickey v. State*, 148 Ark. 595, 231 S.W. 549 (1921); *Leach v. State*, 229 Ark. 802, 318 S.W.2d 617 (1958).

The granting of a continuance is in the sound discretion of the trial court which will not be reversed unless the action is plainly erroneous or is a clear abuse of discretion. *Baltimore & O.R.R. v. McGill Bros. Rice Mill*, 185 Ark. 108, 46 S.W.2d 651 (1932); *Perez v. State*, 236 Ark. 921, 370 S.W.2d 613 (1963); *Andrews v. Lauener*, 229 Ark. 894, 318 S.W.2d 805 (1958); *Wallace v. Hamilton*, 238 Ark. 406, 382 S.W.2d 363 (1964); *Thacker v. State*, 253 Ark. 864, 489 S.W.2d 500 (1973); *Conway v. State*, 256 Ark. 131, 505 S.W.2d 758 (1974); *Derrick v. State*, 259 Ark. 316, 532 S.W.2d 431 (1976); *Kelley v. State*, 261 Ark. 31, 545 S.W.2d 919 (1977); *Johnson v. State*, 287 Ark. 426, 700 S.W.2d 786 (1985).

The denial of a continuance when the motion is not in substantial compliance with this section is not an abuse of the trial court's discretion. *Cloird v. State*, 314 Ark. 296, 862 S.W.2d 211 (1993); *Wilson v. State*, 320 Ark. 142, 895 S.W.2d 524 (1995).

The factors to consider in exercising discretion over a continuance motion are the diligence of the movant, the probable effect of the testimony at trial, the likelihood of procuring the attendance of the witness in the event of a postponement, and the filing of an affidavit, stating not only what facts the witness would prove, but also that the appellant believes them to be true. *Cloird v. State*, 314 Ark. 296, 862 S.W.2d 211 (1993).

The burden is on the appellant to establish prejudice and abuse of discretion in the denial of a continuance. *Cloird v. State*, 314 Ark. 296, 862 S.W.2d 211 (1993).

On review, the alleged failure of defendant to file an affidavit regarding the testimony of a witness defendant sought to have testify at his trial was not addressed because the prosecutor did not object before the trial court that defendant failed to file the requisite affidavit; however, the court found that the trial court did not abuse its discretion in denying the motion for a continuance because defendant failed to show prejudice resulting from the denial. *Stenhouse v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 347 (June 2, 2005).

Evidence.

On motion for continuance, testimony may be heard for purpose of showing a want of diligence in procuring testimony of absent witness, or want of good faith in making application, or an improbability that proposed testimony can be obtained. *Lane v. State*, 67 Ark. 290, 54 S.W. 870 (1899).

A continuance cannot be granted on an affidavit of counsel as to what his client told him. *Morgan v. Austin*, 206 Ark. 235, 174 S.W.2d 562 (1943).

Factors to Be Considered.

Besides compliance with the statutory requirement of an affidavit, the court should consider several other factors in determining whether a continuance should be granted. Among these are the

diligence of the movant in obtaining witnesses, the probable effect of the testimony at trial, and the likelihood of procuring the attendance of the witness in the event of a postponement. *David v. State*, 295 Ark. 131, 748 S.W.2d 117 (1988).

In exercising its discretion concerning a request for a continuance to obtain the presence of a witness, the trial court should consider the following factors: (1) the diligence of the movant, (2) the probable effect of the testimony at trial, (3) the likelihood of procuring the attendance of the witness in the event of a postponement, and (4) the filing of an affidavit, stating not only what facts the witness would prove, but also that the movant believes them to be true. *Butler v. State*, 303 Ark. 380, 797 S.W.2d 435 (1990).

Continuance denied even though psychiatric report had not been filed in strict compliance with § 5-2-305(d) where defendant failed to show any prejudice. *Turner v. State*, 326 Ark. 115, 931 S.W.2d 86 (1996).

Grounds.

This section does not require that a motion for continuance be reduced to writing and supported by affidavits, unless the opposite party demands it; but, if a motion on the grounds of surprise is overruled, the party complaining should set forth the facts constituting the surprise. *Venable v. State*, 177 Ark. 91, 5 S.W.2d 716 (1928).

Before the appellants would be entitled to a continuance because of the filing of a cross-complaint, it would be necessary for them to show that they had been misled to their prejudice and in what respect they had been misled. *Williams v. Bullington*, 195 Ark. 253, 111 S.W.2d 507 (1937).

Noncompliance.

Procedure required by this section held

not followed. *Malone v. State*, 292 Ark. 243, 729 S.W.2d 167 (1987); *Johnson v. State*, 305 Ark. 580, 810 S.W.2d 44 (1991).

The denial of a motion which is not in substantial compliance with the statute is not an abuse of discretion. *Butler v. State*, 303 Ark. 380, 797 S.W.2d 435 (1990).

As the state did not object to a continuance, appellant's failure to submit an affidavit is not fatal under this section. *Rankin v. State*, 57 Ark. App. 125, 942 S.W.2d 867 (1997).

Objection.

A party not objecting to a ruling granting a continuance is estopped from objecting on appeal to the form of the motion. *Drown v. White River Levee Dist.*, 181 Ark. 629, 27 S.W.2d 793 (1930).

Subsection (a) mandates an affidavit to justify a continuance due to a missing witness when the state objects to the continuance. *Wilson v. State*, 320 Ark. 142, 895 S.W.2d 524 (1995).

Time for Filing.

A motion for a continuance by a defendant should not be made before filing answer. *Winter v. Bandel*, 30 Ark. 362 (1875).

Court did not err in denying defendant's motion for a continuance to procure expert testimony where defendant waited until two days before the trial when he had had five months in which to obtain an expert. *Cherry v. State*, 347 Ark. 606, 66 S.W.3d 605 (2002).

Cited: *Copeland v. State*, 226 Ark. 198, 289 S.W.2d 524 (1956); *Worley v. State*, 259 Ark. 433, 533 S.W.2d 502 (1976); *Jones v. State*, 20 Ark. App. 1, 722 S.W.2d 871 (1987); *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied, 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

16-63-403. No continuance until costs paid.

No order of continuance takes effect until the plaintiff or, if the continuance has been granted upon the motion of the defendant, the defendant has made or secured the payment of all costs of the action, due for the term in which the continuance is granted.

History. Civil Code, § 775; Acts 1871, § 1272; Pope's Dig., § 1496; A.S.A. 1947, No. 48, § 1 [775], p. 219; C. & M. Dig., § 27-1404.

16-63-404. Dismissal in vacation.

The plaintiff or his or her attorney may dismiss any suit, except actions of replevin, pending in any of the courts of this state, in vacation, in the office of the clerk on the payment of all costs that may have accrued therein.

History. Rev. Stat., ch. 116, § 134; C. & M. Dig., § 1262; Pope's Dig., § 1486; A.S.A. 1947, § 27-1406.

CASE NOTES**ANALYSIS**

Appealability.
Consent decree.
Foreign corporation.
Judgment or decree.
Nonsuit.
Replevin.
Right to dismiss.
Substantial compliance.

Appealability.

Since motion to dismiss with prejudice filed by the plaintiff did not constitute a cross-complaint, reviewing court affirmed the order of the chancellor who concluded that there was no appealable order of the court. *Lewis v. Brown*, 232 Ark. 983, 341 S.W.2d 772 (1961).

Consent Decree.

Consent decree purporting to dismiss action but also including matters of importance in addition to the direction of dismissal of the action cannot be entered in vacation. *Parker v. Frierson*, 124 Ark. 238, 187 S.W. 162 (1916).

Foreign Corporation.

A foreign corporation which had not complied with the laws of this state brought an action against the appellee. It was held that the corporation could dismiss its action in vacation and then after complying with the state laws bring another action upon the same grounds. *J.R. Watkins Medical Co. v. Horne*, 133 Ark. 570, 203 S.W. 24 (1918).

Judgment or Decree.

This section does not provide for the dismissal of a judgment or decree in vacation. *Shuman v. Irby*, 201 Ark. 907, 147 S.W.2d 358 (1941).

Where court having jurisdiction of the subject matter and the parties entered a

decree awarding maintenance to wife and children, an attempted dismissal by the wife in vacation was ineffectual in depriving the court of jurisdiction of husband's motion to modify the decree. *Shuman v. Irby*, 201 Ark. 907, 147 S.W.2d 358 (1941).

Nonsuit.

A nonsuit taken before a clerk in vacation, on payment of costs, is authorized by the statute. *State Bank v. Gray*, 12 Ark. 760 (1852); *Lyons v. Green*, 68 Ark. 205, 56 S.W. 1075 (1900); *Glenn v. Porter*, 68 Ark. 320, 57 S.W. 1109 (1900).

Since prior to the submission of a cause to the court, a party had the absolute right to nonsuit his partition plea, by filing and subsequently nonsuiting his partition plea, plaintiff did not waive his right nor was he estopped to raise the homestead exemption under § 18-60-401. *Pascall v. Smith*, 267 Ark. 66, 588 S.W.2d 700 (1979).

Replevin.

Dismissal of replevin action in vacation by notation on record following delivery of property to plaintiff on failure of defendant to file bond was without legal authority; hence trial court erred in refusing to reinstate replevin action. *Commercial Credit Corp. v. Mackay*, 221 Ark. 226, 252 S.W.2d 819 (1952).

Right to Dismiss.

The plaintiff may dismiss at any time when the court is not in session. *Saint Louis, I.M. & S. Ry. v. Ingram*, 118 Ark. 377, 176 S.W. 692 (1915).

The right to dismiss an action rests only with the plaintiff and a plaintiff is one who has and asserts a cause of action against another. *Walton v. Rucker*, 193 Ark. 40, 97 S.W.2d 442 (1936).

Plaintiff has the right to dismiss any

suit he has brought by application either to the court or to the clerk in vacation. *Norton v. Hutchins*, 196 Ark. 856, 120 S.W.2d 358 (1938).

A plaintiff has the right to dismiss his complaint but he has no right to dismiss a defendant's cross-complaint. *Dorsey v. Dorsey*, 226 Ark. 192, 289 S.W.2d 190 (1956).

The plaintiff has an absolute right to dismiss his case at any time before final submission to the court. *Lewis v. Brown*, 232 Ark. 983, 341 S.W.2d 772 (1961).

Court properly dismissed action. *Lewis*

v. Brown, 232 Ark. 983, 341 S.W.2d 772 (1961).

Before any defense pleadings were filed the petitioner for habeas corpus proceedings had the right to dismiss his petition under this section. *Austin v. Austin*, 241 Ark. 634, 409 S.W.2d 833 (1966).

Substantial Compliance.

Action of plaintiff's counsel to dismiss pending action and payment of all the costs was held to amount to a dismissal of the action as authorized by this section. *Missouri P.R.R. v. Haigler*, 203 Ark. 804, 158 S.W.2d 703 (1942).

16-63-405. [Superseded.]

A.C.R.C. Notes. The Supreme Court of Arkansas stated in a *Per Curiam* of Nov. 24, 1986, that this section, concerning proceedings on setoff or counterclaim where plaintiff's action is dismissed, was

deemed superseded by the Arkansas Rules of Civil Procedure. The section was derived from Civil Code, § 403; C. & M. Dig., § 6236; Pope's Dig., § 8192; A.S.A. 1947, § 27-1407.

16-63-406. Stay of proceedings in which party or attorney is a member or an employee of the General Assembly.

(a)(1) Any and all proceedings in suits pending in any of the courts of this state in which any attorney for either party to any suit is the Lieutenant Governor or a member of the Senate or the House of Representatives, or is a clerk or sergeant at arms or a doorkeeper of either branch of the General Assembly, and any and all proceedings and suits pending in any of the courts of this state in which the Lieutenant Governor or any member of the General Assembly or clerk or sergeant at arms or doorkeeper of either branch of the General Assembly is a party, shall be stayed for not less than fifteen (15) days preceding the convening of the General Assembly and for thirty (30) days after its adjournment, sine die, unless otherwise requested by any interested member of the General Assembly or interested officer or employee of the General Assembly.

(2) The motion for a continuance need not be reduced to writing.

(3) It is not necessary that notice be afforded to opposing counsel that a continuance is sought.

(b) Any and all proceedings and suits pending in any of the courts in this state in which any attorney for either party to any suit is a member of the Legislative Council, the Legislative Joint Auditing Committee, or any interim committee of the General Assembly shall be stayed or reset if scheduled if the proceeding or hearing has been scheduled on the day immediately prior to, the day immediately after, or the day upon which the Legislative Council, Legislative Joint Auditing Committee, or any interim committee is meeting if the attorney is a member, or an alternate member attending in the place of a regular member, of the committee which is meeting and the attorney requests the continuance

of the court no less than three (3) days before the proceeding is to commence.

(c) The term "adjournment sine die" as used in this section shall mean the adjournment without the establishment of a day certain for reconvening.

(d) The provisions of this section shall be applicable in the case of special or extraordinary sessions of the General Assembly, as well as regular sessions.

History. Acts 1981, No. 312, § 1; A.S.A. 1947, § 27-1401.1; Acts 1997, No. 1354, § 35.

Cross References. Administrative hearings, § 25-15-103.

CASE NOTES

Continuance Granted.

Court granted attorney's motion for an extension of time of 45 days after the

legislature adjourns in which to file an appellate brief. *Wilson v. Neal*, 327 Ark. 783, 939 S.W.2d 312 (1997).

16-63-407. Striking causes of action.

The plaintiff may strike from his or her complaint any cause of action at any time before the final submission of the case to the jury or to the court, where the trial is by the court.

History. Civil Code, § 102; C. & M. Dig., § 1077; Pope's Dig., § 1285; A.S.A. 1947, § 27-1408.

CASE NOTES

Election of Issues, Causes, and Remedies.

It was held that it was not error for the trial court not to require an election by the plaintiff where he asked an instruction only upon one issue in suit. *Luce v. Arkansas Brick & Mfg. Co.*, 125 Ark. 219, 188 S.W. 566 (1916).

Bringing an attachment suit against a prospective buyer because he had failed to comply with the terms of his contract is not such an election of remedies as will

prevent an amendment of the complaint before trial so as to sue in replevin where the original complaint was made without full information regarding the facts. *S.E. Lux, Jr., Mercantile Co. v. Jones*, 177 Ark. 342, 6 S.W.2d 302 (1928).

Plaintiff may elect whether or not to join in one action separate causes of action accruing to him under separate contracts. *State Life Ins. Co. v. Goodrum*, 189 Ark. 509, 74 S.W.2d 230 (1934).

SUBCHAPTER 5 — CITIZEN PARTICIPATION IN GOVERNMENT ACT

SECTION.

- 16-63-501. Title.
- 16-63-502. Legislative findings.
- 16-63-503. Definitions.
- 16-63-504. Immunity from suit.

SECTION.

- 16-63-505. Verification requirement.
- 16-63-506. Failure to properly verify.
- 16-63-507. Procedure.
- 16-63-508. Other recovery not precluded.

16-63-501. Title.

This subchapter shall be known as and may be cited as the “Citizen Participation in Government Act”.

History. Acts 2005, No. 1843, § 1.

16-63-502. Legislative findings.

The General Assembly finds and declares that:

(1) It is in the public interest to encourage participation by the citizens of the State of Arkansas in matters of public significance through the exercise of their constitutional rights of freedom of speech and the right to petition government for a redress of grievances;

(2) The valid exercise of the constitutional rights of freedom of speech and the right to petition government for a redress of grievances should not be chilled through abuse of the judicial process;

(3) The threat of a civil action for damages in the form of a strategic lawsuit against political participation and the possibility of considerable legal costs can act as a deterrent to citizens who wish to report information to federal, state, or local agencies; and

(4) Strategic lawsuits against political participation can effectively punish concerned citizens for exercising the constitutional right to speak and petition the government for a redress of grievances.

History. Acts 2005, No. 1843, § 1.

16-63-503. Definitions.

As used in this subchapter:

(1) “An act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the United States Constitution or the Arkansas Constitution in connection with an issue of public interest or concern” includes, but is not limited to, any written or oral statement, writing, or petition made:

(A) Before or to a legislative, executive, or judicial proceeding, or other proceeding authorized by a state, regional, county, or municipal government; or

(B) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or other body authorized by a state, regional, county, or municipal government; and

(2)(A) “Privileged communication” means a communication made:

(i) In, to, or about an issue of public concern related to any legislative, executive, or judicial proceeding, or other proceeding authorized by a state, regional, county, or municipal government;

(ii) In the proper discharge of an official duty; and

(iii) By a fair and true report of any legislative, executive, or judicial proceeding, or other proceeding authorized by a state, regional, county, or municipal government, or anything said in the course of the proceeding.

(B) "Privileged communication" also includes:

(i) All expressions of opinion or criticisms in regard to any legislative, executive, or judicial proceeding, or other proceeding authorized by a state, regional, county, or municipal government; and

(ii) All criticisms of the official acts of any and all public officers.

(C) "Privileged communication" does not include a statement or report made with knowledge that it was false or with reckless disregard of whether it was false.

History. Acts 2005, No. 1843, § 1.

16-63-504. Immunity from suit.

Any person making a privileged communication or performing an act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the United States Constitution or the Arkansas Constitution in connection with an issue of public interest or concern shall be immune from civil liability, unless a statement or report was made with knowledge that it was false or with reckless disregard of whether it was false.

History. Acts 2005, No. 1843, § 1.

16-63-505. Verification requirement.

For any claim asserted against a person or entity arising from possible privileged communication or an act by that person or entity that could reasonably be construed as an act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the United States Constitution or the Arkansas Constitution in connection with an issue of public interest or concern, the party asserting the claim and the party's attorney of record, if any, shall be required to file contemporaneously with the pleading containing the claim a written verification under oath certifying that:

(1) The party and his or her attorney of record, if any, have read the claim;

(2) To the best of the knowledge, information, and belief formed after reasonable inquiry of the party or his or her attorney, the claim is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(3) The act forming the basis for the claim is not a privileged communication; and

(4) The claim is not asserted for any improper purpose such as to suppress the right of free speech or right to petition government of a person or entity, to harass, or to cause unnecessary delay or needless increase in the cost of litigation.

History. Acts 2005, No. 1843, § 1.

16-63-506. Failure to properly verify.

(a) If a claim governed by § 16-63-505 is not verified as required by § 16-63-505, the claim shall be stricken unless it is verified within ten (10) days after the omission is called to the attention of the party asserting the claim or his or her attorney of record.

(b)(1) If a claim is verified in violation of § 16-63-505, the court, upon motion or upon its own initiative, shall impose upon the persons who signed the verification, a represented party, or both, an appropriate sanction, which may include dismissal of the claim and an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the claim, including a reasonable attorney's fee.

(2) Other compensatory damages may be recovered only upon the demonstration that the claim was commenced or continued for the purpose of harassing, intimidating, punishing, or maliciously inhibiting a person or entity from making a privileged communication or performing an act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the United States Constitution or the Arkansas Constitution in connection with an issue of public interest or concern.

History. Acts 2005, No. 1843, § 1.

16-63-507. Procedure.

(a)(1) All discovery and any pending hearings or motions in an action for a claim governed by § 16-63-505 shall be stayed upon the filing of a motion to dismiss or a motion to strike under § 16-63-506.

(2) A hearing on a motion filed under § 16-63-506 shall be conducted not more than thirty (30) days after service unless emergency matters before the court require a later hearing.

(b) The court, upon motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted notwithstanding the provisions of subsection (a) of this section.

History. Acts 2005, No. 1843, § 1.

16-63-508. Other recovery not precluded.

Nothing in this subchapter shall affect or preclude the right of any party to any recovery otherwise authorized by common law, statute, or rule.

History. Acts 2005, No. 1843, § 1.

CHAPTER 64

TRIAL AND VERDICT

SECTION.

- 16-64-101. Trial generally.
- 16-64-102. Issues.
- 16-64-103. Trial by court or jury.
- 16-64-104. Requirements as to jury trials applicable to trials by court.
- 16-64-105. [Superseded.]
- 16-64-106 — 16-64-108. [Repealed.]
- 16-64-109. [Superseded.]
- 16-64-110. Order of trial.
- 16-64-111. Interpreters for persons with communication problems generally.
- 16-64-112. Interpreters for the deaf.
- 16-64-113. Jury may view subject of litigation.
- 16-64-114. Jury instructions generally.
- 16-64-115. Jury instructions — Further instruction during deliberations.
- 16-64-116. Conduct of jury after submission of case.

SECTION.

- 16-64-117. Separation of jury — Admonishment by court.
- 16-64-118. Discharge of jury.
- 16-64-119. Verdict of jury — Polling jury.
- 16-64-120. Recovery of damages.
- 16-64-121. Assessment of damages by jury.
- 16-64-122. Comparative fault.
- 16-64-123. Excessiveness of damages generally.
- 16-64-124. Remittitur.
- 16-64-125. Method of serving judgment on defendant constructively summoned.
- 16-64-126. Title of bona fide purchasers of property unaffected by new trial.
- 16-64-127 — 16-64-129. [Repealed.]
- 16-64-130. Punitive damage — Contract involving financial institutions.

Publisher's Notes. Some provisions of this chapter may be superseded by the Arkansas Rules of Civil Procedure, Rules of Appellate Procedure and Rules for Inferior Courts pursuant to the Supersession Rule adopted by the Supreme Court of Arkansas in its order of December 18, 1978.

Effective Dates. Acts 1871, No. 48, § 1 [890]: effective 90 days after passage.

Acts 1875 (Adj. Sess.), No. 92, § 2: effective on passage.

Acts 1901, No. 125, § 2: effective on passage.

Acts 1915, No. 290, § 24: June 1, 1915.

Acts 1945, No. 196, § 3: approved Mar. 6, 1945. Emergency clause provided: "It is found that there is some confusion at present in the procedure necessary to properly present stipulations of fact and other papers filed in a cause of action in order to obtain a review by the appellate courts on the merits of the controversy and unless such procedure is immediately clarified there is imminent danger of litigants losing substantial rights on account of technical objections to the preparation and presentation of the record in the trial

of the cause. An emergency is therefore declared and this act shall be in full force and effect from and after its passage."

Acts 1949, No. 460, § 6: approved Mar. 28, 1949. Emergency clause provided: "It has been ascertained and declared that in tort cases where the defendant has either failed to answer or has answered and failed to appear and defend, and in such cases, it is necessary for the court to empanel a jury to try the sole issue of damages. This requirement has caused great delay in the trial of lawsuits, and in addition, has increased the expense unnecessarily, so that there is immediate need for legislation to eliminate the unnecessary expense. It is, therefore, ascertained that an emergency exists and this Act being necessary for the preservation of public peace, health and safety, shall be in full force and effect from and after its passage."

Acts 1951, No. 139, § 9: approved Feb. 23, 1951. Emergency clause provided: "It is found that there is great confusion at present in the procedure necessary to properly preserve and present evidence on appeal from the chancery courts, and that

such procedure is now governed by special acts applicable to the several chancery districts within the State which are wholly dissimilar, making it necessary to follow a separate procedure in each of the respective chancery districts in order to obtain a review by the appellate court on the merits of the controversy, and unless such procedure is immediately clarified and made uniform there is imminent danger of litigants losing substantial rights on account of technical objections to the preparation and presentation of the record in the trial of the cause. An emergency is, therefore, declared and this Act shall be in full force and effect from and after its passage."

Acts 1979, No. 664, § 5: Mar. 30, 1979. Emergency clause provided: "It is hereby found and determined by the Seventy-Second General Assembly that there is an immediate need to provide qualified interpreters for deaf persons at administrative, civil and criminal proceedings and that

this Act is immediately necessary to accomplish the same. Therefore, an emergency is hereby declared to exist, and this Act being immediately necessary for the preservation of the public peace, health and safety, shall be in full force and effect from and after its approval."

Acts 1991, No. 469, § 7: Mar. 12, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is an immediate need to protect the confidentiality of privileged communications between qualified interpreters for deaf and hearing-impaired persons occurring at administrative, civil and criminal proceedings and that this act is immediately necessary. Therefore, an emergency is hereby declared to exist, and this act being immediately necessary for the preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Disqualification, for bias, of one offered as interpreter of testimony. 6 ALR 4th 158.

Manner or extent of examination of witnesses by trial judge. 6 ALR 4th 951.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties. 9 ALR 4th 1041.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter. 12 ALR 4th 1016.

Stipulation or waiver in state civil case, to accept verdict by number or proportion of jurors less than that constitutionally permitted. 15 ALR 4th 213.

Attorneys: communication with jurors after trial. 19 ALR 4th 1209.

Waiver or loss of right to disqualify judge by participation in proceedings. 24 ALR 4th 870; 27 ALR 4th 597.

Disqualification of judge because of assault or threat against him by party or person associated with party. 25 ALR 4th 923.

Impeachment of verdict by juror's evidence that he was coerced or intimidated by fellow juror. 39 ALR 4th 800.

Inconsistency of verdicts on separate theories of negligence, breach of warranty, or strict liability. 41 ALR 4th 9.

Am. Jur. 75 Am. Jur. 2d, Trial, § 1 et seq.

C.J.S. 88 C.J.S., Trial, § 1 et seq.

CASE NOTES

Cited: *Melton v. St. Louis, I.M. & S. Ry.*, 99 Ark. 433, 139 S.W. 289 (1911); *Rolfe v.*

Spybuck Drainage Dist. No. 1, 101 Ark. 29, 140 S.W. 988 (1911).

16-64-101. Trial generally.

A trial is a judicial examination of the issues, whether of law or of fact, in an action.

History. Civil Code, § 336; C. & M. Dig., § 1263; Pope's Dig., § 1487; A.S.A. 1947, § 27-1701.

16-64-102. Issues.

(a) Issues arise upon the pleadings where a fact or conclusion of law is maintained by one party and controverted by the other. They are of two (2) kinds: of law and of fact.

(b)(1) An issue of law arises upon a demurrer to the complaint, answer, or reply, or to some part thereof.

(2) An issue of fact arises upon:

(A) A material allegation in the complaint denied by the answer;

(B) A setoff or counterclaim presented in the answer and denied by the reply; and

(C) Material new matter in the answer or reply, which shall be considered as controverted by the opposite party without further pleading.

(c) Issues both of law and fact may arise upon different parts of the pleadings in the same action. In such cases, the issues of law must be first tried unless the court otherwise directs.

History. Civil Code, §§ 334, 335; Acts §§ 1488, 1489; A.S.A. 1947, §§ 27-1702, 1871, No. 48, § 1 [334, 335], p. 219; C. & M. Dig., §§ 1264, 1265; Pope's Dig., 27-1703.

CASE NOTES

Failure to Answer.

Where no answer is filed, no issue of fact is raised in the allegations. State ex rel.

Greene County Bar Ass'n v. Huddleston, 173 Ark. 686, 293 S.W. 353 (1927).

16-64-103. Trial by court or jury.

(a) Issues of law must be tried by the court.

(b) Issues of fact, arising in action by proceedings at law for the recovery of money or of specific real or personal property, shall be tried by a jury unless a jury trial is waived.

History. Civil Code, § 337; C. & M. Dig., § 1266; Pope's Dig., § 1490; A.S.A. 1947, § 27-1704.

Cross References. Right to trial by jury, Ark. Const., Art. 2, § 7.

RESEARCH REFERENCES

Ark. L. Rev. Civil Procedure — Limitations on Instructing the Jury as to Matters of Fact. 5 Ark. L. Rev. 88.

CASE NOTES

Issues of Fact.

Since a bastardy proceeding was essentially in action at law for the recovery of money, the defendant was entitled to a jury trial on the issues of fact, such as paternity of the child. *Waddell v. State*, 235 Ark. 293, 357 S.W.2d 651 (1962).

Whether the one charged is the father of the illegitimate child is a question of fact under this section. *Waddell v. State*, 235 Ark. 293, 357 S.W.2d 651 (1962).

In bastardy proceedings, § 9-10-106 (repealed), providing that where decisions of a bastardy referee are appealed to the circuit court there shall be a trial de novo without jury conducted by the judge of the circuit court, is controlling, rather than this section, providing for jury trial of issues of fact. *Dunn v. Davis*, 291 Ark. 492, 725 S.W.2d 853 (1987).

Cited: *Stark v. Couch*, 109 Ark. 534, 160 S.W. 853 (1913).

16-64-104. Requirements as to jury trials applicable to trials by court.

The provisions of Title IX of the Civil Code respecting trials by jury apply, so far as they are in their nature applicable, to trials by the court.

History. Civil Code, § 377; C. & M. Dig., § 1310; Pope's Dig., § 1535; A.S.A. 1947, § 27-1745.

Publisher's Notes. Title IX of the

Civil Code, referred to in this section, means §§ 334-442 of the Code of Practice in Civil Cases of 1869. See parallel reference tables in the tables volume.

16-64-105. [Superseded.]

Publisher's Notes. This section was held to be superseded by ARCP 49 in In re Amendments to Rules of Civil Procedures, 279 Ark. 470, 651 S.W.2d 63 (1983). The

section was derived from Acts 1949, No. 460, §§ 1-3; A.S.A. 1947, §§ 27-1743.1 — 27-1743.3.

16-64-106 — 16-64-108. [Repealed.]

Publisher's Notes. These sections, concerning the time period for trial for actions at law and in equity, were repealed by Acts 2003, No. 1185, § 193. The sections were derived from the following sources:

16-64-106. Civil Code, § 394; Acts 1915, No. 290, §§ 10, 11; C. & M. Dig., §§ 1286, 1287; Pope's Dig., §§ 1510, 1511; A.S.A. 1947, §§ 27-1717, 27-1718.

16-64-107. Civil Code, § 396; Acts 1915, No. 290, § 13; C. & M. Dig., § 1289; Pope's Dig., § 1514; A.S.A. 1947, § 27-1720.

16-64-108. Civil Code, § 398; C. & M. Dig., § 1291; Pope's Dig., § 1516; A.S.A. 1947, § 27-1722.

16-64-109. [Superseded.]

(a) Where an order for a provisional remedy has been made by a judge or justice in an action within the jurisdiction of his or her respective court and the order has been served or levied, the trial of the action or disposition of the order may take place at any time after five (5) days' notice to the defendant, without waiting for the regular term

of the judge's or justice's court. The notice may be given by the officer at the time of serving the summons or levying the order.

(b) If the justice before whom the trial should be regularly had is sick, absent, or unable to act, the officer may return the case for trial before the most convenient magistrate.

(c) If it is made to appear satisfactorily to the judge or justice, by affidavit or other proof, that the defendant has left the county of his or her residence and is within the state, the judge or justice shall immediately enter on his or her docket an order requiring the defendant to appear within fifteen (15) days thereafter for the trial of the order and answer to the plaintiff's complaint, or that judgment will be entered against him or her, and his or her property sold to satisfy the judgment. The order shall be served by posting copies of it in four (4) conspicuous places in the county, one (1) of which shall be at the county seat.

History. Civil Code, § 825; Acts 1871, No. 48, § 1 [825], p. 219; A.S.A. 1947, § 27-1723.

16-64-110. Order of trial.

When the jury has been sworn, the trial shall proceed in the following order unless the court, for special reasons, otherwise directs:

(1) The plaintiff must briefly state his or her claim and the evidence by which he or she expects to sustain it;

(2) The defendant must then briefly state his or her defense and the evidence he or she expects to offer in support of it;

(3)(A) The party on whom rests the burden of proof in the whole action must first produce his or her evidence;

(B) The adverse party will then produce his or her evidence;

(4) The parties will then be confined to rebutting evidence unless the court, for good reasons, in furtherance of justice, permits them to offer evidence in their original case;

(5) When the evidence is concluded, either party may request instructions to the jury on points of law, which shall be given or refused by the court, and the instructions shall be reduced to writing if either party requires it; and

(6) The parties may then submit or argue the case to the jury. In the argument the party having the burden of proof shall have the opening and conclusion, and if, upon the demand of his or her adversary, he or she refuses to open and fully state the grounds upon which he or she claims a verdict, he or she shall be refused the conclusion.

History. Civil Code, § 349; Acts 1875 (Adj. Sess.), No. 92, § 1, p. 174; C. & M. Dig., § 1292; Pope's Dig., § 1517; A.S.A. 1947, § 27-1727.

Cross References. Burden of proof, § 16-40-101.

CASE NOTES

ANALYSIS

In general.
 Discretion of court.
 Instructions.
 —Timeliness.
 Intervener.
 Statement of claim.
 Submission or argument to jury.
 Verdict.

In General.

These provision are mandatory, and it is error for the judge to fail to comply therewith. *Anderson v. State*, 34 Ark. 257 (1879); *National Lumber Co. v. Snell*, 47 Ark. 407, 1 S.W. 708 (1886).

There was error where the trial court required the party who did not have the burden of proof to present its case first. *Arkansas State Hwy. Comm'n v. Post*, 330 Ark. 369, 955 S.W.2d 496 (1997).

Discretion of Court.

There was no abuse of discretion when the circuit court allowed the defendant to recall the plaintiff, in personal injury action, for several additional questions on cross examination while the plaintiff was still putting on his case. *Piercy v. Wal-Mart Stores, Inc.*, 311 Ark. 424, 844 S.W.2d 337 (1993).

Instructions.

Where a party demands that instructions be in writing, it is error to make oral explanations of the charge; and unless it affirmatively appears that the error is harmless it is ground for reversal. *Mazzia v. State*, 51 Ark. 177, 10 S.W. 257 (1888); *Excelsior Mfg. Co. v. Owens*, 58 Ark. 556, 25 S.W. 868 (1894); *Merrill v. Van Buren*, 125 Ark. 248, 188 S.W. 537 (1916).

Instruction must not assume facts which are to be determined by the jury. *Townslly-Myrick Dry Goods Co. v. Greenfield*, 58 Ark. 625, 25 S.W. 282 (1894); *McMurray v. Boyd*, 58 Ark. 504, 25 S.W. 505 (1894).

Party cannot complain of instructions given at other's request if he asked one to same effect. *St. Louis & S.F. Ry. v. Dodd*, 59 Ark. 317, 27 S.W. 227 (1894); *Dunnington v. Frick Co.*, 60 Ark. 250, 30 S.W. 212 (1895); *Saint Louis, I.M. & S. Ry. v. Baker*, 67 Ark. 531, 55 S.W. 941 (1900).

If a party wishes an instruction on a

point not covered by court's charge, he should ask one covering it. *White v. McCracken*, 60 Ark. 613, 31 S.W. 882 (1895); *Lackey v. State*, 67 Ark. 416, 55 S.W. 213 (1900); *Saint Louis, I.M. & S. Ry. v. Wilson*, 70 Ark. 136, 66 S.W. 661 (1902).

Instructions not based on evidence are misleading. *Saint Louis, I.M. & S. Ry. v. Denty*, 63 Ark. 177, 37 S.W. 719 (1896); *Saint Louis, I.M. & S. Ry. v. Sweet*, 63 Ark. 563, 40 S.W. 463 (1897).

Instructions should not confine jury's attention to one of two grounds for relief relied on. *W.W. Johnson Co. v. Triplett*, 66 Ark. 233, 50 S.W. 455 (1899).

Instructions should not submit undisputed facts but should assume them to be true. *Saint Louis, I.M. & S. Ry. v. Baker*, 67 Ark. 531, 55 S.W. 941 (1900); *Milwaukee Harvester Co. v. Tymich*, 68 Ark. 225, 58 S.W. 252 (1900); *Saint Louis, I.M. & S. Ry. v. Tomlinson*, 69 Ark. 489, 64 S.W. 347 (1901); *McGee v. Smitherman*, 69 Ark. 632, 65 S.W. 461 (1901); *Burnett v. State*, 72 Ark. 398, 81 S.W. 382 (1904).

Instructions should cover defendant's theory as well as plaintiff's. *Little Rock Traction & Elec. Co. v. Trainer*, 68 Ark. 106, 56 S.W. 789 (1900); *Little Rock Traction & Elec. Co. v. Morrison*, 69 Ark. 289, 62 S.W. 1045 (1901).

Abstract instructions should not be given. *Inabnett v. St. Louis, I.M. & S. Ry.*, 69 Ark. 130, 61 S.W. 570 (1901); *Saint Louis & S.F. Ry. v. Townsend*, 69 Ark. 380, 63 S.W. 994 (1901); *Saint Louis, I.M. & S. Ry. v. Wilson*, 70 Ark. 136, 66 S.W. 661 (1902).

Written instructions being asked, an oral charge taken in shorthand is insufficient. *Arnold v. State*, 71 Ark. 367, 74 S.W. 513 (1903); *Burnett v. State*, 72 Ark. 398, 81 S.W. 382 (1904).

The requirements of the law are met when instructions given by the court are reduced to writing and subject to the inspection by counsel at some time before the end of the trial. *Reed v. Rogers*, 134 Ark. 528, 204 S.W. 973 (1918).

Directing counsel to read to the jury instructions given at their request, though not proper, was held not prejudicial where court stated that instructions given were the instructions of the court and that jury was bound to consider them

as the law of the case. *Missouri P.R.R. v. Hunnicutt*, 193 Ark. 1128, 104 S.W.2d 1070 (1937).

The trial court may for sufficient reasons give an instruction after the argument. *Crain v. St. Louis-San Francisco Ry.*, 206 Ark. 465, 176 S.W.2d 145 (1943).

—Timeliness.

Trial judge has discretion to require instructions to be settled before argument begins, and, as a means to this end, may require any special request for instructions to be made before opening of argument. *Saint Louis S.W. Ry. v. Mitchell*, 115 Ark. 339, 171 S.W. 895 (1914).

In action for damages to a truck struck by a train at a crossing, giving instruction regarding duties of locomotive engineers after the argument had been concluded was not error. *Crain v. St. Louis-San Francisco Ry.*, 206 Ark. 465, 176 S.W.2d 145 (1943).

Intervener.

One who intervenes in an attachment suit is entitled to open and close the argument by virtue of having the burden of proof, though the landlord answers that the alleged subtenancy was a scheme to defraud him. *Jones v. Seymour*, 95 Ark. 593, 130 S.W. 560 (1910).

Where the plaintiff and an intervener sought to recover in the same action upon a policy of life insurance, it was within the trial court's discretion to determine the order of the argument. *Metropolitan Life Ins. Co. v. Shane*, 98 Ark. 132, 135 S.W. 836 (1911).

Statement of Claim.

It is duty of trial judge to see that counsel in his opening statement confines himself to a brief statement of his claim, or defense, and the evidence he expects to sustain it. *Kansas City S. Ry. v. Murphy*, 74 Ark. 256, 85 S.W. 428 (1905).

If court fails to restrain counsel within his legitimate scope and privilege, it is the right of opposing counsel to object to the argument. The objection should be definite and call for a ruling of the court thereon, and if court then fails to properly restrain and control argument within proper bounds, and instruct jury to disregard any improper remarks and admonish counsel, then an exception should be taken. *Kansas City S. Ry. v. Murphy*, 74 Ark. 256, 85 S.W. 428 (1905).

Under this section defendant's attorneys should have demanded that plaintiff's attorneys make a full and complete opening statement if defendant's attorneys desired to make the subsequent claim that new matter was injected in the closing argument. *Reddell v. Norton*, 225 Ark. 643, 285 S.W.2d 328 (1955).

Submission or Argument to Jury.

In condemnation proceedings, the land owner has the opening and concluding argument. *Springfield & M.R.R. v. Rhea*, 44 Ark. 258 (1884).

The right to open and close abides with the plaintiff so long as he has anything to prove to recover a verdict for more than nominal damages. *Saint Louis, I.M. & S. Ry. v. Taylor*, 57 Ark. 136, 20 S.W. 1083 (1893).

Burden of proof found to be on the plaintiff, entitling him to open and close the argument. *Mansur & Tebbetts Imp. Co. v. Davis*, 61 Ark. 627, 33 S.W. 1074 (1896); *Mine La Motte Lead & Smelting Co. v. Consolidated Anthracite Coal Co.*, 85 Ark. 123, 107 S.W. 174 (1907); *Kilpatrick v. Rowan*, 119 Ark. 175, 177 S.W. 893 (1915); *Copeland v. National Union Fire Ins. Co.*, 177 Ark. 1178, 9 S.W.2d 561 (1928).

The order of argument is to be determined by the pleadings. *Beal & Doyle Dry Goods Co. v. Barton*, 80 Ark. 326, 97 S.W. 58 (1906).

Burden of proof found to be on the defendant, entitling him to open and close the argument. *Roberts v. Padgett*, 82 Ark. 331, 101 S.W. 753 (1907); *Eminent Household of Columbian Woodmen v. Howle*, 131 Ark. 299, 198 S.W. 286 (1917); *Kempner v. Stephens*, 186 Ark. 877, 56 S.W.2d 580 (1933); *Vern Barnett Constr. Co. v. J.A. Hadley Constr. Co.*, 254 Ark. 866, 496 S.W.2d 446 (1973).

This section, if not mandatory, certainly grants to trial courts power to control course of argument as to conform to orderly procedure, and unless there is a clear abuse of discretion, Supreme Court will not interfere. *Dickinson v. McBride*, 127 Ark. 555, 193 S.W. 89 (1917).

As a matter of right, the one on whom the burden rests shall have the right to close the argument as well as to open it, if in his opening statement he fully states grounds upon which he claims a verdict. *Dickinson v. McBride*, 127 Ark. 555, 193 S.W. 89 (1917).

Where after delivery of plaintiff's opening argument, defendant refused to give his argument, it was proper for court to then permit plaintiff to proceed with his closing argument, since defendant by such action could not deprive the plaintiff of his right to conclude the argument, and motion of defendant thereafter that he then be permitted to give his argument to jury was properly overruled. *Dickinson v. McBride*, 127 Ark. 555, 193 S.W. 89 (1917).

The right to open and close must ordinarily be asserted at the opening of the trial, before the other party introduces any evidence; where, at the beginning of the trial one of the parties acquiesces in, or permits without objection, the assumption by the other party of the burden of proof, it is not proper to permit the former to open and conclude the argument to the jury. *Southern Nat'l Ins. Co. v. Heggie*, 206 Ark. 196, 174 S.W.2d 931 (1943).

The party having the burden of proof shall make the opening and closing argument, and where there is more than one party it is within the court's discretion to fix the order of argument. *Schwam v. Reece*, 213 Ark. 431, 210 S.W.2d 903 (1948).

The defendant has right to open and close arguments before jury when he has burden of proof. *Johnson v. Stout*, 218 Ark. 599, 238 S.W.2d 97 (1951).

The party holding the affirmative of the

issues joined in the pleadings and who would be defeated if no evidence were given on either side has the right to open and close the evidence in argument. In the argument, the party having the burden of proof shall have the opening and conclusion. *Wyatt v. W.B. Smith Hatchery, Inc.*, 232 Ark. 611, 339 S.W.2d 323 (1960).

Trial court abused its discretion in denying defendant insurer's attorney the right to present a closing argument to the jury simply because the plaintiff waived his right to do so where the insurer bore the burden of proving its affirmative defenses. *American Livestock Ins. Co. v. Garrison*, 28 Ark. App. 330, 774 S.W.2d 431 (1989).

Verdict.

Notwithstanding the weight of testimony was to the effect that defendant made no false representations to plaintiff, it was error to direct a verdict for the defendant if there was a conflict in the testimony upon that point. *Hutchison v. Gorman*, 71 Ark. 305, 73 S.W. 793 (1903).

A verdict should not be directed unless it can be said as a matter of law that no recovery can be had upon any reasonable view of the facts which the evidence tends to establish. *St. Louis, I.M. & S. Ry. v. Neal*, 71 Ark. 445, 78 S.W. 220 (1903).

Cited: *Property Owners Imp. Dist. No. 247 v. Williford*, 40 Ark. App. 172, 843 S.W.2d 862 (1992).

16-64-111. Interpreters for persons with communication problems generally.

(a) Every person who cannot speak or understand the English language or who because of hearing, speaking, or other impairment has difficulty in communicating with other persons and who is a party to any civil proceeding or a witness therein shall be entitled to an interpreter to assist such person throughout the proceeding.

(b)(1) The interpreter may be retained by the party or witness or, if the person is unable to pay for an interpreter, may be appointed by the court before which the action is pending.

(2) If an interpreter is appointed by the court, the fee for the services of the interpreter shall be set by the court and shall be paid in such manner as the court may determine.

(3) If a certified foreign language interpreter from the roster is appointed by the court in a civil matter, the judge may certify the appointment to the Director of the Administrative Office of the Courts as provided in § 16-10-127(e)(1).

(c) Any court may inquire into the qualifications and integrity of any interpreter and may disqualify any person from serving for cause as an interpreter.

(d) Every interpreter for another person who is either a party or a witness in a court proceeding as referred to in this section shall take the following oath:

“Do you solemnly swear (or affirm) that you will justly, truly, and impartially interpret to the oath about to be administered to him (her), and the questions which may be asked him (her), and the answers that he (she) shall give to such questions, relative to the cause now under consideration before this court, so help you God (or under the pains and penalties of perjury)?”

History. Acts 1973, No. 555, § 2; A.S.A. 1947, § 27-835; Acts 2001, No. 424, § 2.

Publisher's Notes. This section may be affected by § 16-10-127.

Amendments. The 2001 amendment deleted “one” preceding “may be appointed” in (b)(1); and added (b)(3).

16-64-112. Interpreters for the deaf.

(a) For the purpose of appointing an interpreter for a deaf person under § 16-64-111:

(1)(A) “Qualified interpreter” means an interpreter certified by the National Registry of Interpreters for the Deaf, Arkansas Registry of Interpreters for the Deaf, or, in the event an interpreter so certified is not available, an interpreter who is otherwise qualified.

(B)(i) Efforts to obtain the services of a qualified interpreter certified with a Legal Skills Certificate or a Comprehensive Skills Certificate will be made prior to accepting services of an interpreter with lesser certification.

(ii) No qualified interpreter shall be appointed unless the appointing authority and the deaf person make a preliminary determination that the interpreter is able to readily communicate with the deaf person and is able to accurately interpret the statements of the deaf person and interpret the proceedings in which a deaf person may be involved.

(iii) Every deaf person entitled to an interpreter under § 16-64-111 shall be entitled to a qualified interpreter as defined by this subsection.

(2)(A) “Oral interpreter” means a person who interprets language through facial and lip movements only and who does not use manual communication.

(B)(i) An oral interpreter shall be provided upon the request of a deaf person who does not communicate in sign language.

(ii) The right of a deaf person to an interpreter may not be waived except by a deaf person who does not use sign language and who initiates the request for waiver in writing. The waiver is subject to approval of counsel, if existent, to that deaf person and is subject to approval of the appointing authority.

(b) Every deaf person whose appearance before a proceeding entitles him or her to an interpreter should notify the appointing authority of his or her need prior to any appearance and should request at that time the services of an interpreter. Where a deaf person reasonably expects the need for an interpreter to be for a period greater than a single day, he or she should notify the appointing authority and such notification shall be sufficient for the duration of his or her participation in the proceedings.

(c) An appointing authority may require a person requesting the appointment of an interpreter to furnish reasonable proof of his deafness when the appointing authority has reason to believe that the person is not deaf.

(d) It shall be the responsibility of the appointing authority to channel requests for qualified interpreters through:

(1)(A) The Arkansas Registry of Interpreters for the Deaf;

(B) The Department of Health and Human Services; or

(C) The University of Arkansas at Little Rock Interpreter Training Program; or

(2) In the alternative, any community resource wherein the appointing authority or the deaf person is knowledgeable that such qualified interpreters can be found.

(e) Before a qualified interpreter participates in any proceedings subsequent to an appointment under the provisions of this section, the interpreter shall make an oath or affirmation that the interpreter will make a true interpretation in an understandable manner to the deaf person for whom he or she is appointed and that such interpreter will interpret the statements of the deaf person desiring that statements be made, in the English language to the best of such interpreter's skill and judgment.

(f) The appointing authority shall provide recess periods as necessary for the interpreter when the interpreter so indicates.

(g) Any and all information that the interpreter gathers, learns from, or relays to the deaf person or person who is unable to communicate in English pertaining to any administrative, civil, or criminal proceeding shall at all times remain confidential and privileged, on an equal basis with the attorney-client privilege, unless such deaf person or person who is unable to communicate in English desires that such information be communicated to other persons.

(h) An interpreter appointed under the provisions of this section shall be entitled to a reasonable fee for his or her services. The fee shall be in accordance with standards established by the Arkansas Registry of Interpreters for the Deaf, in addition to actual expenses for travel and transportation. When the interpreter is appointed by a court, the fee shall be paid out of general county funds and, when the interpreter is otherwise appointed, the fee shall be paid out of funds available to the appointing authority.

History. Acts 1979, No. 664, §§ 1, 2; A.S.A. 1947, §§ 5-715.1, 5-715.2; Acts 1991, No. 469, § 1.

Publisher's Notes. This section may be affected by § 16-10-127.

Acts 1979, No. 664, §§ 1 and 2, are also codified as §§ 16-89-105 and 25-15-102.

RESEARCH REFERENCES

UALR L.J. Survey — Evidence, 14
UALR L.J. 793.

CASE NOTES

Cited: *Quinney v. Pittman*, 320 Ark. 177, 895 S.W.2d 538 (1995).

16-64-113. Jury may view subject of litigation.

Whenever, in the opinion of the court, it is proper for the jury to have a view of real property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury is thus absent, no person other than the person so appointed shall speak to them on any subject connected with the trial.

History. Civil Code, § 350; C. & M. Dig., § 1293; Pope's Dig., § 1518; A.S.A. 1947, § 27-1731.

CASE NOTES

ANALYSIS

Condemnation.

Crops.

Ejectment.

In a body.

Instructions.

Personal property.

Real property.

Request for view.

Scene of accident.

Condemnation.

In suits by lot owners to recover damages for condemnation of portions of their lots, it was within trial court's discretion to permit view of property even though one of the parties objected. *Bridgman v. Baxter County*, 202 Ark. 15, 148 S.W.2d 673 (1941).

Crops.

In a lawsuit involving crop damage, the jury was properly allowed to visit the fields where the damage occurred.

McGraw v. Weeks, 326 Ark. 285, 930 S.W.2d 365 (1996).

Ejectment.

In suit for damages for wrongful ejection from street car, it was proper to permit jury to examine a car and the controller thereon. *Dobbins v. Little Rock Ry. & Elec. Co.*, 79 Ark. 85, 95 S.W. 794 (1906).

It was not an abuse of discretion to deny the plaintiff a request that the jury view the land involved in an ejectment suit. *Holimon v. Rice*, 208 Ark. 279, 185 S.W.2d 927 (1945).

In a Body.

Where a juror alone visited the place of the accident, refusal to grant the defendant's request that the entire jury be conducted to the place of the accident was held error. *Gus Blass Co. v. May*, 189 Ark. 1115, 76 S.W.2d 92 (1934).

Instructions.

In an action to recover for work done in

a building under agreement to perform work in a workmanlike manner, instructions, that on a view of the premises, the jury should not base their verdict on their examinations, and that the impression made upon their minds by the examination did not constitute a part of the evidence in the cause, were properly refused. *Fitzgerald v. La Porte*, 67 Ark. 263, 54 S.W. 342 (1899).

Personal Property.

In an action for injuries caused by the bursting of a saw, where the defendant acquiesced in the jury's viewing the machine, the conduct of the jury in having the saw taken apart was not error. *Trumbull v. Martin*, 137 Ark. 495, 208 S.W. 803 (1918).

Since the section refers to real property only, a request that the jury be permitted to inspect a locomotive similar to one on which plaintiff received the injury for which the action is brought was properly refused. *Missouri P.R.R. v. Hendrix*, 169 Ark. 825, 277 S.W. 337 (1925), cert. denied, 270 U.S. 651, 46 S. Ct. 351, 70 L. Ed. 781 (1926).

Real Property.

While the exercise of the authority to allow a jury view rests in the judgment and discretion of the court and not the jury, where the court inquired of the jury whether they felt that they wanted to view the property and after receiving a negative reply denied the motion for a

jury view, the ruling was proper. *Arkansas State Hwy. Comm'n v. Carder*, 228 Ark. 8, 305 S.W.2d 330 (1957).

Request for View.

A request for view need not be made in the absence of the jury. *Ratton v. Busby*, 230 Ark. 667, 326 S.W.2d 889 (1959).

Permitting the request for view to be made in the presence of the jury was not prejudicial to the defendant where the court made it clear to the jury that it was the court refusing the view and not the defendant who was trying to hide something. *Ratton v. Busby*, 230 Ark. 667, 326 S.W.2d 889 (1959).

Scene of Accident.

In action for damages for personal injuries, where plaintiff was struck by moving train, it was no abuse of discretion for trial court to refuse to order jury to visit scene of accident, it being in another county and a very exact plat of ground in question having been introduced in evidence. *Louisiana & A. Ry. v. Woodson*, 127 Ark. 323, 192 S.W. 174 (1917).

Trial court was held not to have abused its discretion in overruling railroad company's motion for an order requiring jury to view crossing where accident occurred where company had introduced a photograph of crossing made a few days after fatal accident which was evidence of the physical facts existing at the crossing when deceased was killed. *Missouri P.R.R. v. Foreman*, 196 Ark. 636, 119 S.W.2d 747 (1938).

16-64-114. Jury instructions generally.

In the trial of all cases in courts of record wherein juries are employed, it shall be the duty of the presiding trial judge to deliver to the jury immediately prior to its retirement for deliberation a typewritten copy of the instructions which has been given to the jury orally, when counsel for all parties so request. This copy of instructions shall, at the time of the dismissal of the jury, be returned to the court by the foreman of the jury.

History. Acts 1957, No. 128, § 1; A.S.A. 1947, § 27-1732.1.

Cross References. Charge to jury, Ark. Const., Art. 7, § 23.

CASE NOTES

ANALYSIS

Discretion of court.
Model instructions.
Standards for instructions.
Undue emphasis.

Discretion of Court.

It is within the court's discretion to send typewritten instructions to the jury room notwithstanding that all parties did not so request. *Gambill v. Stroud*, 258 Ark. 766, 531 S.W.2d 945 (1976).

In a medical malpractice action the trial court did not abuse its discretion in allowing, over plaintiffs' objection, the jury to take typewritten instructions into the jury room, since neither party may veto the judge's determination. *Gambill v. Stroud*, 258 Ark. 766, 531 S.W.2d 945 (1976).

The trial court may, within its discretion, give the instructions to the jury regardless whether they are requested. *Waganer v. Travelers Ins. Co.*, 269 Ark. 976, 601 S.W.2d 277 (Ct. App. 1980).

A trial court need not give an instruction which needs explanation, modification, or qualification, nor is a trial judge required to give repetitious or redundant instructions. *Newman v. Crawford Constr. Co.*, 303 Ark. 641, 799 S.W.2d 531 (1990).

Model Instructions.

When jury instructions are requested which do not conform to the Arkansas Model Jury Instructions (AMI), they should be given only when the trial judge finds the AMI instructions do not contain an essential instruction or do not accurately state the law applicable to the case, and if the model instructions given to the jury cover the matters embraced in the requested instruction, it is not error to refuse such instruction. *Newman v. Crawford Constr. Co.*, 303 Ark. 641, 799 S.W.2d 531 (1990).

Standards for Instructions.

Jury instructions should be based on the evidence in the case, and instructions stating only abstract legal propositions or submitting matters on which there is no evidence should not be given. *Newman v. Crawford Constr. Co.*, 303 Ark. 641, 799 S.W.2d 531 (1990).

Undue Emphasis.

Evidence found that one part of the instruction was emphasized at the expense of another part and constituted error. *Waganer v. Travelers Ins. Co.*, 269 Ark. 976, 601 S.W.2d 277 (Ct. App. 1980).

16-64-115. Jury instructions — Further instruction during deliberations.

After the jury has retired for deliberation, if there is a disagreement between them as to any part of the testimony or if they desire to be informed as to any point of law arising in the case, they may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or their counsel.

History. Civil Code, § 353; C. & M. Dig., § 1296; Pope's Dig., § 1521; A.S.A. 1947, § 27-1734.

CASE NOTES

ANALYSIS

Discretion of court.
Mandatory compliance.
Permission to separate.

Presumption of prejudice.
Request for clarification.

Discretion of Court.

Allowing the jury to have access to

something which has not been admitted into evidence will not necessarily, without more, constitute an abuse of discretion. *Dickerson Constr. Co. v. Dozier*, 266 Ark. 345, 584 S.W.2d 36 (1979).

This section prescribes the method of communicating the information required; not necessarily the information requested; thus, before additional information is given, the trial court must determine whether the information requested is required, and the trial court has broad discretion to decide what information should be given to the jury. *National Bank of Commerce v. HCA Health Servs. of Midwest, Inc.*, 304 Ark. 55, 800 S.W.2d 694 (1990).

Mandatory Compliance.

Compliance with this section is mandatory. *National Bank of Commerce v. HCA Health Servs. of Midwest, Inc.*, 304 Ark. 55, 800 S.W.2d 694 (1990).

Permission to Separate.

In a civil trial the jury may be permitted to separate either during the trial or after the case is submitted to them. *Williams v. Williams*, 112 Ark. 507, 166 S.W. 552 (1914).

Presumption of Prejudice.

Prejudice is presumed from a violation of this section unless the lack of prejudice is manifest. *National Bank of Commerce v. HCA Health Servs. of Midwest, Inc.*, 304 Ark. 55, 800 S.W.2d 694 (1990).

Request for Clarification.

Where jury foreman went alone to the judge to request a clarification of a jury instruction and the judge in the presence of counsel for both sides told the foreman that no further instructions were required and neither party requested that the jury be brought in for further instructions or objected to the court's handling of the incident, the only violation of this section was in the foreman's requesting the instruction himself rather than sending the deputy to convey the request, and there was no prejudice. *National Bank of Commerce v. HCA Health Servs. of Midwest, Inc.*, 304 Ark. 55, 800 S.W.2d 694 (1990).

Cited: *Jones v. Parrish*, 330 Ark. 521, 954 S.W.2d 934 (1997); *Lowry v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 279 (Mar. 23, 2005).

16-64-116. Conduct of jury after submission of case.

(a) When the case is finally submitted to the jury, they may decide in court or retire for deliberation.

(b)(1) If the jury retires, they must be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court, subject to the discretion of the court to permit them to separate temporarily at night and at their meals.

(2) The officer having them under his or her charge shall not allow any communication to be made to them, or make any himself or herself, except to ask them if they have agreed upon their verdict, unless by order of the court, and he or she shall not, before their verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

History. Civil Code, § 351; C. & M. Dig., § 1294; Pope's Dig., § 1519; A.S.A. 1947, § 27-1732.

16-64-117. Separation of jury — Admonishment by court.

If the jury is permitted to separate, either during the trial or after the case is submitted to them, they may be admonished by the court that it is their duty not to converse with or allow themselves to be addressed

by any other person on any subject of the trial and, during the trial, that it is their duty not to form or express an opinion thereon until the cause is finally submitted to them.

History. Civil Code, § 352; C. & M. Dig., § 1295; Pope's Dig., § 1520; A.S.A. 1947, § 27-1733.

16-64-118. Discharge of jury.

(a) The jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing.

(b) In all cases where the jury is discharged during the trial, or after the cause is submitted to them, it may be tried again immediately or at a future date, as the court may direct.

History. Civil Code, §§ 354, 355; C. & M. Dig., §§ 1297, 1298; Pope's Dig., §§ 1522, 1523; A.S.A. 1947, §§ 27-1735, 27-1736.

Cross References. Verdict by agreement of nine jurors in civil cases, Ark. Const., Art. 2, § 7; Amend. No. 16.

CASE NOTES

Authority of Court.

Authority conferred on trial court by this section is directive or permissive rather than mandatory and rests in the discretion of the court. *Gregory v. Colvin*, 235 Ark. 1007, 363 S.W.2d 539 (1963).

The legislature intended to give the trial court authority to direct when the

cause would be tried again — immediately or at some future date — but did not give the court authority to direct whether or not the cause was to be retried, and trial court could not permanently deny a party the right to a retrial. *Gregory v. Colvin*, 235 Ark. 1007, 363 S.W.2d 539 (1963).

16-64-119. Verdict of jury — Polling jury.

(a) When the jury has agreed upon its verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman.

(b) When the verdict is announced either party may require the jury to be polled, which is done by the clerk or court asking each juror if it is his or her verdict. If any one answers in the negative, the jury must again be sent out for further deliberation.

(c) The verdict shall be written, signed by the foreman, and read by the court or clerk to the jury, and the inquiry made whether it is their verdict.

(d)(1) If any juror disagrees, the jury must be sent out again.

(2) If no disagreement is expressed, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case.

History. Civil Code, §§ 356, 357; C. & M. Dig., §§ 1299, 1300; Pope's Dig., §§ 1524, 1525; A.S.A. 1947, §§ 27-1737, 27-1738.

RESEARCH REFERENCES

Ark. L. Rev. Arkansas Model Jury Instructions: Introductory and Closing Instructions, Use of General Verdict and Interrogatories, Negligence, Proximate

Cause, Owners and Occupiers of Land, Common Carriers, Railroads, and Comparative Negligence, 20 Ark. L. Rev. 66.

CASE NOTES

ANALYSIS

Objections.

Polling the jury.

—Failure to request poll.

Verdict.

Verdict forms.

Objections.

Where the verdict was in writing, rendered in open court, received without objection, and duly recorded, appellant waived any objection to the requirement that the verdict forms be signed. *Fisher v. Valco Farms*, 328 Ark. 741, 945 S.W.2d 369 (1997).

Polling the Jury.

When, on a poll of the jury, a juror answered that he did not believe the verdict was right but agreed to it for the sake of harmony, it will not be said that he answered in the negative but that he answered in the affirmative and that the verdict was his own. *Williams v. Williams*, 112 Ark. 507, 166 S.W. 552 (1914).

Where in proceedings for assessment of damages for lands verdict was signed by the foreman only and record showed no request for a poll of the jury, presumption obtains that the verdict was unanimous and the signatures of the jurors were therefore not required. *Montgomery County v. Cearley*, 192 Ark. 868, 95 S.W.2d 554 (1936).

Court's refusal to allow defendant's counsel to poll the jury in order to inquire about the dollar amount it intended plaintiff to recover was proper since this section only permits polling the jury to ask each juror if the verdict is his verdict. *Northwestern Nat'l Cas. Co. v. Mays*, 273 Ark. 16, 616 S.W.2d 734 (1981).

A trial judge, before ruling on a motion to modify the verdict, should not have an ex parte conversation with some of the

jurors about anything which caused them to assent to the verdict. To do so is error. *Coran v. Keller*, 295 Ark. 308, 748 S.W.2d 349 (1988).

—Failure to Request Poll.

Although there may have been a unanimous verdict which was not disclosed because of failure to poll the jury, a new trial was granted where an instruction was given pursuant to a void statute that agreement by nine jurors would substantiate a verdict. *Davis v. H.A. Nelson & Son*, 132 Ark. 436, 201 S.W. 511 (1918).

Where neither party required jury to be polled, verdict became final, and defendant could not complain that verdict was not unanimous. *Browne v. Dugan*, 189 Ark. 551, 74 S.W.2d 640 (1934).

There is a presumption that the verdict was unanimous and the signatures of the jurors were therefore not required. *Montgomery County v. Cearley*, 192 Ark. 868, 95 S.W.2d 554 (1936).

Verdict.

It is error to refuse to a jury permission to retire and reconsider their verdict where, on hearing it read by the clerk, they state to the court that it is not their verdict. *Saxon v. Foster*, 69 Ark. 626, 65 S.W. 425 (1901). See also *Harris v. Graham & Bordley*, 86 Ark. 570, 111 S.W. 984 (1908).

The requirement that the verdict be written and signed by the foreman may be waived where an unsigned verdict is rendered in open court and duly received without objection and thereafter recorded. *Hodges v. Bayley*, 102 Ark. 200, 143 S.W. 92 (1912).

Where two verdicts are written on the same paper and signed beneath by the foreman, there is sufficient compliance with the statute. *Fox v. State*, 156 Ark. 428, 246 S.W. 863 (1923).

Fact that a question mark appeared on the written verdict after the amount of damages was awarded did not invalidate the verdict, the jury having been asked by the court whether it was their verdict after it was read by the clerk and having replied in the affirmative. *Price-Snapp-Jones Co. v. Brown*, 184 Ark. 1143, 45 S.W.2d 517 (1932).

The verdict should reflect the true and correct and final conclusion of the jury and if before discharging the jury, it is made known to the court that the jury has misunderstood the instructions, it is no error to permit the jury to further consider their verdict, after the instructions have been explained. *Cleft v. Jordan*, 207 Ark. 66, 178 S.W.2d 1009 (1944).

Trial court errs in making a substantive amendment to the verdict after the discharge of the jury. *Coran v. Keller*, 295 Ark. 308, 748 S.W.2d 349 (1988).

Neither statute nor long-standing precedent permitted the trial court to recall the jury after discharge and poll the individual jurors based on a claim that the jury misunderstood the instructions; nor did the law allow the jury to correct or amend its verdict once it was discharged from the case and had left the presence

and control of the court. *Spears v. Mills*, 347 Ark. 932, 69 S.W.3d 407 (2002).

Where a jury awarded punitive damages, but no compensatory damages, and one week after the jury had been discharged the jury foreman filed an affidavit to that effect, the trial court did not err in not correcting the verdict because the jury had been discharged and there was a strict rule that a jury's verdict could not be corrected after the jury had been discharged; however, the court did err in not granting new trial as no fair-minded juror could have awarded no compensatory damages after having found in favor of appellant on all counts. *Waste Mgmt. of Ark., Inc. v. Roll Off Serv.*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 881 (Dec. 1, 2004).

Verdict Forms.

District court did not abuse its discretion, under Federal Rule of Civil Procedure 49, by using general verdict form instead of special verdict form submitted by defendant which alleged plaintiff's comparative fault. *Davis v. Ford Motor Co.*, 128 F.3d 631 (8th Cir. 1997).

Cited: *Womack v. Brickell*, 232 Ark. 385, 337 S.W.2d 655 (1960); *Martin v. Blackmon*, 277 Ark. 190, 640 S.W.2d 435 (1982).

16-64-120. Recovery of damages.

Whenever damages are recoverable, the plaintiff may claim and recover any rate of damages to which he or she may be entitled for the cause of action established.

History. Civil Code, § 376; A.S.A. 1947, § 27-1730.

CASE NOTES

Excessive Damages.

The court followed the rule that verdicts will be set aside for excessive damages only when not supported by proof or when they are so excessive as to indicate pas-

sion or prejudice or an incorrect appreciation of the law. *Coca-Cola Bottling Co. v. Cordell*, 189 Ark. 1132, 76 S.W.2d 307 (1934).

16-64-121. Assessment of damages by jury.

When, by the verdict, either party is entitled to recover money of the adverse party, the jury in their verdict must assess the amount of recovery.

History. Civil Code, § 361; C. & M. Dig., § 1305; Pope's Dig., § 1530; A.S.A. 1947, § 27-1742.

CASE NOTES

Judgment.

Ordinarily, the jury must assess the amount of the recovery, but where the parties apparently agreed to submit only the issue of liability to the jury, the judge

could enter judgment for the amount of damages claimed by the plaintiff. *Winters v. Barr*, 263 Ark. 618, 566 S.W.2d 745 (1978).

16-64-122. Comparative fault.

(a) In all actions for damages for personal injuries or wrongful death or injury to property in which recovery is predicated upon fault, liability shall be determined by comparing the fault chargeable to a claiming party with the fault chargeable to the party or parties from whom the claiming party seeks to recover damages.

(b)(1) If the fault chargeable to a party claiming damages is of a lesser degree than the fault chargeable to the party or parties from whom the claiming party seeks to recover damages, then the claiming party is entitled to recover the amount of his or her damages after they have been diminished in proportion to the degree of his or her own fault.

(2) If the fault chargeable to a party claiming damages is equal to or greater in degree than any fault chargeable to the party or parties from whom the claiming party seeks to recover damages, then the claiming party is not entitled to recover such damages.

(c) The word "fault" as used in this section includes any act, omission, conduct, risk assumed, breach of warranty, or breach of any legal duty which is a proximate cause of any damages sustained by any party.

(d) In cases where the issue of comparative fault is submitted to the jury by an interrogatory, counsel for the parties shall be permitted to argue to the jury the effect of an answer to any interrogatory.

History. Acts 1975, No. 367, §§ 1-3; A.S.A. 1947, §§ 27-1763 — 27-1765; Acts 1991, No. 663, § 1.

RESEARCH REFERENCES

Ark. L. Rev. Note, The Arkansas Product Liability Act of 1979, 35 Ark. L. Rev. 364.

Note, Imputed Negligence Under the Arkansas Comparative Liability Statute, Exception: *Stull, Adm'x v. Ragsdale*, 35 Ark. L. Rev. 722.

Woods, Product Liability: Is Comparative Fault Winning the Day?, 36 Ark. L. Rev. 360.

Case Note, *Rini v. Oaklawn Jockey*

Club: Assumption of Risk Rides Again, 41 Ark. L. Rev. 657.

UALR L.J. Survey of Arkansas Law, Torts, 5 UALR L.J. 191.

Note, Torts — Negligence — Contributory Negligence of One Parent Is Imputed to the Other to Diminish the Latter's Recovery for the Death of a Minor Child. *Stull v. Ragsdale*, 273 Ark. 277, 620 S.W.2d 264 (1981). 5 UALR L.J. 289.

Note, Conflict of Laws — Multistate

Torts — Arkansas Relies on Choice-Influencing Considerations and the “Better Rule of Law,” 10 UALR L.J. 511.

Survey — Uniform Commercial Code, 10 UALR L.J. 613.

Survey — Torts, 11 UALR L.J. 261.

Survey — Civil Procedure, 14 UALR L.J. 747.

Annual Survey of Caselaw, Tort Law, 24 UALR L.J. 1085.

Sizing Up a Multi-Party Tortfeasor Suit in Arkansas: A Tale of Two Laws — How Fault Is, and Should Be, Distributed, 26 UALR L.J. 251.

CASE NOTES

ANALYSIS

In general.

Construction.

Purpose.

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Review.

Scope.

Seat belts.

In General.

The court's refusal to ask the jurors whether they meant to allow no one to recover was based upon a correct understanding of the comparative negligence statute. *Brown v. Keaton*, 232 Ark. 12, 334 S.W.2d 676 (1960) (decision under prior law).

This section defines comparative fault, in essence, as the comparing of fault between a claiming party and the party against whom the claiming party seeks to recover. *Rathbun v. Ward*, 315 Ark. 264, 866 S.W.2d 403 (1993).

Construction.

While it is true that the right to contribution from a joint tortfeasor is dependent upon a finding of joint and several liability, subsection (d) does not allow the concepts and effects of contribution among

joint tortfeasors to be argued to the jury; this section is clear in this respect and is not ambiguous. *Rathbun v. Ward*, 315 Ark. 264, 866 S.W.2d 403 (1993).

Subsection (d) is expressly limited to issues of comparative fault; if the legislature intended to allow counsel to argue issues of contribution and indemnity among joint tortfeasors, it would have so provided when it added subsection (d) to this section. *Rathbun v. Ward*, 315 Ark. 264, 866 S.W.2d 403 (1993).

Purpose.

The purpose of the comparative negligence statute is to distribute the total damages among those who caused them. *FDIC v. Deloitte & Touche*, 834 F. Supp. 1129 (E.D. Ark. 1992).

Applicability.

Fault may be compared in all actions for damages for personal injuries or wrongful death or injury to property. *Little Rock Elec. Contractors v. Okonite Co.*, 294 Ark. 399, 744 S.W.2d 381 (1988).

Malicious prosecution is an intentional tort and, therefore, comparative negligence does not apply. *Kellerman v. Zeno*, 64 Ark. App. 79, 983 S.W.2d 136 (1998).

This section did not apply to an action by a marmalade manufacturer against a jar manufacturer to recover for a business loss which occurred when it had to recall 6,000 cases of marmalade after a consumer complained that he cut his tongue on a sliver of glass in a jar of marmalade since the case did not involve an “injury to property” although the glass jars could have been said to be injured property, the real gist of the action was to recover the business loss from having to take the jars back, not merely to recover the cost of rendering the jars, as jars, nondefective. *E.D. Smith & Sons v. Arkansas Glass Container Corp.*, 236 F.3d 920 (8th Cir. 2001).

Affirmative Defense.

Comparative fault is an affirmative defense. *Skinner v. R.J. Griffin & Co.*, 313 Ark. 430, 855 S.W.2d 913 (1993).

Agency.

While indemnity is commonly granted where liability has been imposed on a person not because of any fault on his part but solely because of his relationship to the one at fault, this doctrine did not apply to a claim against a person since there was no employer-employee or other "agency-type" relationship on which to base imputation of liability. *Missouri P.R.R. v. Star City Gravel Co.*, 592 F.2d 455 (8th Cir. 1979).

Apportionment of Fault.

Where there is evidence of negligence on the part of both plaintiff and defendant, apportionment of fault under Arkansas' comparative fault statute becomes a matter solely within the province of the finder of fact. *Lockett v. International Paper Co.*, 871 F.2d 82 (8th Cir. 1989).

The fact that one party admits negligence at trial does not preempt consideration of any negligence of another party when negligence is properly alleged and supported by evidence. *Bryant v. Eifling*, 301 Ark. 172, 782 S.W.2d 580 (1990).

The Arkansas comparative fault law is capable of recognizing and distributing fault between parties whose misconduct contributed to an actionable loss. *FDIC v. Deloitte & Touche*, 834 F. Supp. 1129 (E.D. Ark. 1992).

It was not error for the court to instruct the jury on comparative fault where there was evidence that plaintiff entered the yard despite the presence of "Beware of the Dog" signs, and that plaintiff's injuries could have been caused by her running from the dog, rather than from the dog's attack. *Turner v. Stewart*, 330 Ark. 134, 952 S.W.2d 156 (1997).

In an action by the owner of an officer building and a tenant against a security company arising from a fire in the building for negligence in failing to detect the fire and failing to timely contact the fire department, the owner was not entitled to recover on the basis that its negligence was less than the combined negligence of the tenant and the security company; it was improper to combine the fault of the tenant and the security company because

the tenant was a co-plaintiff in the action, rather than a defendant. *NationsBank, N.A. v. Murray Guard, Inc.*, 343 Ark. 437, 36 S.W.3d 291 (2001).

Assumption of Risk.

Where it is established in a products liability case that the injured person assumed the risk of injury, there can be no recovery. *Dulin v. Circle F Indus., Inc.*, 558 F.2d 456 (8th Cir. 1977).

Because Arkansas is a comparative fault state, assumption of risk is not a complete bar to recovery but is simply a matter to be considered in deciding fault. *Simmons v. Frazier*, 277 Ark. 452, 642 S.W.2d 314 (1982).

In a products liability action, the jury found that the plaintiff had assumed the risk of the accident. *W.M. Bashlin Co. v. Smith*, 277 Ark. 406, 643 S.W.2d 526 (1982).

Finding of assumption of risk did not bar the plaintiff's recovery for the manufacturer's alleged negligence, since the jury also apportioned a greater percent of the responsibility for the accident to the defendant. *W.M. Bashlin Co. v. Smith*, 277 Ark. 406, 643 S.W.2d 526 (1982).

Where none of the forms of assumption of risk which survives the adoption of comparative fault in Arkansas is applicable to the facts of a case, an instruction on assumption of risk should not be given. *Rini v. Oaklawn Jockey Club*, 861 F.2d 502 (8th Cir. 1988).

On its face, this section purports to merge the defense of assumption of risk into the statutory comparative fault scheme; however, implied secondary reasonable assumption of risk and implied secondary unreasonable assumption of risk must no longer be a complete bar to recovery, but rather one element to be factored into the comparative fault analysis. *Rini v. Oaklawn Jockey Club*, 861 F.2d 502 (8th Cir. 1988).

The adoption of comparative fault represents a legislative judgment that a plaintiff should not be denied recovery for injuries caused by a defendant's negligence simply because the plaintiff was partially at fault, although less at fault than the defendant. *Rini v. Oaklawn Jockey Club*, 861 F.2d 502 (8th Cir. 1988).

A plaintiff's conduct which amounts to assumption of risk is not a complete bar to recovery, but rather is simply one element

to be factored into the comparative fault analysis. *Lockett v. International Paper Co.*, 871 F.2d 82 (8th Cir. 1989).

There was evidence to support the giving of the assumption of risk instruction where plaintiff testified he was aware of all the specific risks that led to his injury. *Bonds v. Snapper Power Equip. Co.*, 935 F.2d 985 (8th Cir. 1991).

Instruction that referred to assumption of risk as a defense was harmless error because the other instructions made it clear that assumption of risk was an element of fault, not a complete bar to recovery. *Bonds v. Snapper Power Equip. Co.*, 935 F.2d 985 (8th Cir. 1991).

Because a jury must compare negligence pursuant to this section, the doctrine of assumption of the risk is no longer applicable in Arkansas as a separate theory. *Ouachita Wilderness Inst. v. Mergen*, 329 Ark. 405, 947 S.W.2d 780 (1997).

Causation.

Proximate cause is defined in terms of direct causation. *Kubik v. Igleheart*, 280 Ark. 310, 657 S.W.2d 545 (1983).

In tort suit against defendant who shot him, plaintiff's negligence would not present an issue for the jury, since the negligent act did not lead in a natural and continuous sequence, unbroken by any efficient intervening cause, to defendant's intentional act of firing the shotgun which caused the damages and, accordingly, instruction on comparative negligence was not warranted. *Kubik v. Igleheart*, 280 Ark. 310, 657 S.W.2d 545 (1983).

In a products liability case, the injured plaintiff could not recover from the defendant/manufacture where the jury found no causal link between the defendant's conduct and the plaintiff's injuries. *Bonds v. Snapper Power Equip. Co.*, 935 F.2d 985 (8th Cir. 1991).

Under the express language of subsection (c) of this section, there must be a determination of "proximate cause" before any "fault" can be assessed against the claiming party. *Skinner v. R.J. Griffin & Co.*, 313 Ark. 430, 855 S.W.2d 913 (1993); *Williams v. Mozark Fire Extinguisher Co.*, 318 Ark. 792, 888 S.W.2d 303 (1994).

Where the evidence at trial did not establish a causal connection between the failure to wear safety goggles and the damages to plaintiff's eye, the trial court erred in giving a comparative fault in-

struction. *Skinner v. R.J. Griffin & Co.*, 313 Ark. 430, 855 S.W.2d 913 (1993).

In determining whether plaintiff's negligence is contributory, plaintiff's conduct is to be viewed as to whether it was a proximate cause of her damages. *Williams v. Mozark Fire Extinguisher Co.*, 318 Ark. 792, 888 S.W.2d 303 (1994).

Contribution among Tortfeasors.

The adoption of comparative fault did not prevent a joint tortfeasor, whose fault had been determined to be in the amount of 50 percent or more, from having contribution from his fellow tortfeasor who was less negligent. *Missouri Pac. R.R. v. Star City Gravel Co.*, 452 F. Supp. 480 (E.D. Ark. 1978), *aff'd*, 592 F.2d 455 (8th Cir. 1959).

Comparative Negligence.

It was proper to find that the total negligence causing the injury should be prorated between the plaintiff and defendant and 25% to driver of tractor-trailer. *Ward Body Works, Inc. v. Smallwood*, 227 Ark. 314, 298 S.W.2d 332 (1957) (decision under prior law).

In personal injury suit, verdicts for plaintiffs were proper. *Missouri Pac. Transp. Co. v. Guthrie*, 227 Ark. 566, 299 S.W.2d 829 (1957) (decision under prior law).

Where plaintiff's contributory negligence is less than that of the other party he is entitled to a verdict but his damages will be reduced in proportion to his contributory negligence. *Gibson v. United States*, (W.D. Ark. 1958) (decision under prior law).

In personal injury action, plaintiff was entitled to recover where the jury found that he was 10% negligent, but his recovery was limited to 90% of his total damages. *Chism v. Phelps*, 228 Ark. 936, 311 S.W.2d 297 (1958) (decision under prior law).

Where pedestrian sued for injuries sustained when struck by automobile while walking across street, the pedestrian could obtain judgment for 20% of his total damages where the jury found him to be 80% negligent. *Johnson v. Brewer*, 228 Ark. 946, 311 S.W.2d 301 (1958) (decision under prior law).

Where the negligence of two parties is equal, neither can recover. *Sunday v. Burk*, 172 F. Supp. 722 (W.D. Ark. 1959) (decision under prior law).

Where the evidence showed that the contributory negligence of both parties was equal the trial judge was correct in his conclusion that neither party could recover against the other. *Easley v. Inglis*, 233 Ark. 589, 346 S.W.2d 206 (1961) (decision under prior law).

Contributory negligence does not bar a plaintiff's recovery if it is of less degree than that of the defendant. *Scoville v. Missouri Pac. R.R.*, 458 F.2d 639 (8th Cir. 1972) (decision under prior law).

Where two vehicles collided and both drivers were negligent, but negligence of one driver was less than that of the other, the first driver may recover as long as the damages are diminished by the jury in proportion to the amount of fault attributable to him. *Scoville v. Missouri Pac. R.R.*, 458 F.2d 639 (8th Cir. 1972).

The basic purpose of law that provided that contributory negligence was not a bar to recovery where negligence of person claiming damages was less than the person causing such damages was to distribute the total damages among those who caused them, and since the legislature intended to deny recovery to a plaintiff only when his negligence was at least 50% of the cause of the alleged injuries, where the plaintiff's negligence was less than 50% of all the codefendants' he was entitled to recover from each or all of them as joint tortfeasors even though the plaintiff's negligence equalled or exceeded that of a particular codefendant. *Riddell v. Little*, 253 Ark. 686, 488 S.W.2d 34 (1973).

Where machine operator employee was experienced, had been cautioned on dangers and had violated operating instructions, there was evidence to support the verdict that his fault exceeded that of his employer. *Smith v. Aaron*, 256 Ark. 414, 508 S.W.2d 320 (1974) (decision under prior law).

Under the Arkansas comparative negligence statute in effect at the time of accident, a claimant could recover only if his negligence was of a lesser degree than the negligence of the defendant; and if a claimant was without fault, he could recover the full amount of any damages proximately caused by the United States and it made no difference that another claimant might have been more negligent than the United States. *Deal v. United States*, 413 F. Supp. 630 (W.D. Ark. 1976), aff'd, 552 F.2d 255 (8th Cir.), cert. denied,

434 U.S. 890, 98 S. Ct. 264, 54 L. Ed. 2d 175 (1977) (decision under prior law).

The fault sought to be compared in comparative negligence claim must be a proximate cause of the damages sustained by a party. *Kubik v. Igleheart*, 280 Ark. 310, 657 S.W.2d 545 (1983).

In a personal injury suit brought by a hotel guest who fell when the toilet lid detached from the toilet assembly, there was no substantial evidence of the guest's negligence and the issue of comparative fault should not have been presented to the jury; thus, the trial court erred by denying a motion for a directed verdict on the issue of comparative negligence and by refusing to instruct the jury as to *res ipsa loquitur*. *Marx v. Huron Little Rock*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 836 (Nov. 10, 2004).

In a negligence case, the trial court committed reversible error when it submitted the case on special interrogatories, without allowing counsel to argue the effect of the comparative-fault special interrogatory. *Campbell v. Entergy Ark., Inc.*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 954 (Dec. 15, 2004).

Exemption.

Where state fair booklet and entry forms clearly stated that the fair association would not be responsible for loss or damage to property while it was on the fair grounds and the fair booklet also specifically informed entrants that if they desired to protect their property from fire loss, they should obtain insurance against that risk, a jury could conclude that, taken as a whole, the clauses exempted the fair association from liability for negligently caused fire damage to property. *Frenley v. National Fire Ins. Co.*, 856 F.2d 1199 (8th Cir. 1988).

Fault.

Fault to be compared may consist of a party's breach of warranty. *Little Rock Elec. Contractors v. Okonite Co.*, 294 Ark. 399, 744 S.W.2d 381 (1988).

Insurance.

In action for benefits of uninsured motorist clause in policy of auto insurance where claimant was found to have been guilty of contributory negligence less in degree than that of other driver, diminution of jury verdict was properly based upon total verdict rather than upon policy

limit for uninsured motorist protection so as to constitute a recovery in excess of policy limit permitting a recovery of penalty and attorney's fees. *Alexander v. Pilot Fire & Cas. Ins. Co.*, 331 F. Supp. 561 (E.D. Ark. 1971) (decision under prior law).

A subrogated insurer is barred from recovery if the insured would be barred from pursuing his cause of action because of his contributory negligence; accordingly, where the evidence showed that decedent's negligence exceeded the total negligence of all the defendants, the subrogated insurer cannot recover for the amounts paid to decedent's beneficiaries. *Insurance Co. of N. Am. v. United States*, 527 F. Supp. 962 (E.D. Ark. 1981).

Jury.

Since there cannot be an unavoidable accident when one of the parties was negligent, the trial court did not err in refusing to instruct the jury relative to unavoidable accident, the collision in question certainly being caused by somebody's negligence and the jury finding both parties to be negligent. *Sullivan v. Fanestiel*, 229 Ark. 662, 317 S.W.2d 713 (1958) (decision under prior law).

It was the function of the jury to determine how the negligence of the plaintiff compared to the negligence of the defendant where there was a question of contributory negligence and assumption of risk involved. *Rhoads v. Service Mach. Co.*, 329 F. Supp. 367 (E.D. Ark. 1971) (decision under prior law).

The question of the comparative negligence of the parties was exclusively for the jury. *Scoville v. Missouri Pac. R.R.*, 458 F.2d 639 (8th Cir. 1972) (decision under prior law).

Where the plaintiff claimed its dairy herd was injured as a result of faulty design of the defendant's silo and defendants responded with sufficient evidence of owner mismanagement at the dairy to warrant a fault comparison by the jury, the district court erred when it refused to instruct the jury to reduce plaintiff's award by the amount of its own negligence or other breach of duty. *Circle J Dairy, Inc. v. A.O. Smith Harvestore Prods., Inc.*, 790 F.2d 694 (8th Cir. 1986).

Where the interrogatory clearly instructed the jury to use 100% to represent the total negligence of the defendants, not

the total negligence contributing to the injury, the jury was allowed to consider the plaintiff's blame. *Circle J Dairy, Inc. v. A.O. Smith Harvestore Prods., Inc.*, 790 F.2d 694 (8th Cir. 1986).

Where the plaintiff asked for \$684,962 in damages and was awarded \$500,000, or approximately 77% of the claim, jurors did not consider any fault on the plaintiff's part equal to or exceeding that attributable to defendants. *Circle J Dairy, Inc. v. A.O. Smith Harvestore Prods., Inc.*, 790 F.2d 694 (8th Cir. 1986).

A trial court is not obligated to give an instruction on assumption of risk when such theory of recovery is no longer applicable law in Arkansas. *Ouachita Wilderness Inst. v. Mergen*, 329 Ark. 405, 947 S.W.2d 780 (1997).

Submission of comparative fault special-interrogatory verdict forms to the jury by the circuit court during deliberations without allowing the victim the opportunity to argue to the jury the effects of answers to those interrogatories violated subsection (d) of this section; further, the error was not harmless, pursuant to Ark. R. Civ. P. 61, as the victim's inability to argue the effects of the jury's answers to the interrogatories was prejudicial. *Campbell v. Entergy Ark., Inc.*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 435 (June 30, 2005).

Malpractice.

The issue of a plaintiff's fault may be submitted to the jury in a legal malpractice action even when the plaintiff has not taken some specific action to interfere with the attorney's performance. *Reliance Nat'l Indem. Co. v. Jennings*, 189 F.3d 689 (8th Cir. 1999).

Mitigation.

The duty to mitigate damages is frequently viewed as a duty imposed by law to further a policy limitation on the amount of damages that may be collected by an injured party. *Resolution Trust Corp. v. Kerr*, 804 F. Supp. 1091 (W.D. Ark. 1992).

Multiple Defendants.

The plaintiff may recover from an individual defendant in a multiple defendant case even though the negligence of the individual defendant is less than that of the plaintiff. *Hiatt v. Mazda Motor Corp.*, 75 F.3d 1252 (8th Cir. 1996).

In a simple negligence case, the relative fault of the plaintiff is compared to the relative fault of the defendant and the plaintiff may recover damages only if his fault is less than the defendant's fault; in a case where there are multiple defendants, this section provides that a plaintiff is allowed to recover if his relative fault is less than the combined fault of all defendants. *Hiatt v. Mazda Motor Corp.*, 75 F.3d 1252 (8th Cir. 1996).

Pleading.

It may be possible to plead comparative negligence in mitigation of the tort of deceit. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. First Nat'l Bank*, 774 F.2d 909 (8th Cir. 1985).

Professional Negligence.

This section can achieve its purpose in an accountant malpractice action, and its application will not improperly protect accountants from liability for the portion of harm caused by their professional negligence. *FDIC v. Deloitte & Touche*, 834 F. Supp. 1129 (E.D. Ark. 1992).

Review.

Apportionment of fault under this state's comparative fault statute is a matter within the province of the finder of fact, and thus subject to review under the clearly erroneous standard. *Mandel v. United States*, 793 F.2d 964 (8th Cir. 1986).

In case where jury determined the plaintiffs were more at fault than the defendants, but still allowed recovery for plaintiffs, the evidence which was presented to the jury on the defendants' behalf was substantial and the trial court was correct in denying the motion for new trial. *Hodges v. Jet Asphalt & Rock Co.*, 305 Ark. 466, 808 S.W.2d 775 (1991).

Scope.

No Arkansas cases suggest that Arkansas follow the substantive comparative fault rule that a plaintiff's degree of fault should always be compared with the fault of other possible wrongdoers, even if plaintiff has asserted no claim against those wrong doers; indeed, given the plain language of this section — that the plaintiff's fault should be compared to that of the parties from whom the plaintiff "seeks to recover damages" — it is hard to imagine how the legislature's words could be

construed to reach such a result. *Hiatt v. Mazda Motor Corp.*, 75 F.3d 1252 (8th Cir. 1996).

Seat Belts.

The nonuse of a seat belt may constitute a proximate cause of injury if some or all of the damage sustained by the nonuser would not have occurred had the seat belt been worn. *Potts v. Benjamin*, 882 F.2d 1320 (8th Cir. 1989).

Failure to wear an available seat belt may, in the absence of a statute requiring use, nevertheless constitute negligence under the general common-law standard of ordinary care. *Potts v. Benjamin*, 882 F.2d 1320 (8th Cir. 1989).

A jury may assess a percentage of fault against plaintiff if defendants can demonstrate the degree to which her injuries would have been reduced by use of a seat belt. *Potts v. Benjamin*, 882 F.2d 1320 (8th Cir. 1989).

Nonuse of seat belts may be admissible as evidence of comparative fault if such nonuse is a proximate cause of plaintiffs' injuries, which the defendant has the burden of proving. *Baker v. Morrison*, 309 Ark. 457, 829 S.W.2d 421 (1992).

Where there was no evidence that their nonuse of seat belts caused their injuries, the trial court erred in denying plaintiffs' motion in limine to exclude evidence concerning their failure to wear seat belts, and the case was remanded for new trial where the erroneously admitted evidence may have led the jury to attribute more fault to plaintiffs than should have been attributed to them. *Baker v. Morrison*, 309 Ark. 457, 829 S.W.2d 421 (1992).

Cited: *Strange v. Stovall*, 261 Ark. 53, 546 S.W.2d 421 (1977); *Wallis v. Mrs. Smith's Pie Co.*, 261 Ark. 622, 550 S.W.2d 453 (1977); *Davis v. Cox*, 268 Ark. 78, 593 S.W.2d 180 (1980); *Larson Mach., Inc. v. Wallace*, 268 Ark. 192, 600 S.W.2d 1 (1980); *Legate v. Passmore*, 268 Ark. 1161, 599 S.W.2d 151 (Ct. App. 1980); *Brewer v. Jeep Corp.*, 546 F. Supp. 1147 (W.D. Ark. 1982); *W.M. Bashlin Co. v. Smith*, 277 Ark. 406, 643 S.W.2d 526 (1982); *Smith v. Missouri Pac. R.R.*, 716 F.2d 1208 (8th Cir. 1983); *Brewer v. Jeep Corp.*, 724 F.2d 653 (8th Cir. 1983); *Bankston v. Pulaski County School Dist.*, 281 Ark. 476, 665 S.W.2d 859 (1984); *Scogin v. Century Fitness, Inc.*, 780 F.2d 1316 (8th Cir. 1985); *Rini v. Oaklawn Jockey Club*, 662 F. Supp.

569 (W.D. Ark. 1987); Dawson v. Fulton, 294 Ark. 624, 745 S.W.2d 617 (1988); Elk Corp. v. Builders Transp., Inc., 862 F.2d 663 (8th Cir. 1988); Garver & Garver v. Little Rock San. Sewer Comm., 300 Ark. 620, 781 S.W.2d 24 (1989); E. Ritter & Co.

v. Department of Army, 874 F.2d 1236 (8th Cir. 1989); Chaney v. Falling Creek Metal Prods., Inc., 906 F.2d 1304 (8th Cir. 1990); Robertson v. Union Pac. R.R., 954 F.2d 1433 (8th Cir. 1992).

16-64-123. Excessiveness of damages generally.

The verdict of any jury rendered in any action for the recovery of damages where the measure thereof is indeterminate or uncertain shall not be held to be excessive or be set aside as excessive, except for some erroneous instruction or, upon evidence, aside from the amount of the damages assessed, that it was rendered under the influence of passion or prejudice.

History. Acts 1901, No. 125, § 1, p. 196; C. & M. Dig., § 1313; Pope's Dig., § 1538; A.S.A. 1947, § 27-1903.

RESEARCH REFERENCES

ALR. Liability of cigarette manufacturers for punitive damages. 108 ALR 5th 343.

CASE NOTES

ANALYSIS

Constitutionality.

In general.

Applicability.

Factors considered.

Grounds for reduction.

Power of court.

Reduction improper.

Constitutionality.

The court held this section to be void insofar as it curtailed the appellate jurisdiction of the Supreme Court. Whether this section is void insofar as it affects the jurisdiction of the circuit court was not decided. Saint Louis & N. Ark. R.R. v. Mathis, 76 Ark. 184, 91 S.W. 763 (1905).

In General.

This section is not the basic authority for reduction of a jury verdict by a trial court and it only purports to limit the basic and inherent power of the court in certain cases. Dorey v. McCoy, 246 Ark. 1244, 442 S.W.2d 202 (1969).

Applicability.

Where losing party did not waive all errors and where the winning party did

not remit the excess, this section does not apply. Dorey v. McCoy, 246 Ark. 1244, 442 S.W.2d 202 (1969).

Factors Considered.

The standard of review for whether damages are so excessive as to shock the conscience of the court or demonstrate that the jury was motivated by passion or prejudice involves consideration of such elements as past and future medical expenses, permanent injury, loss of earning capacity, scars resulting in disfigurement, and pain, suffering, and mental anguish. Gipson v. Garrison, 308 Ark. 344, 824 S.W.2d 829 (1992).

Grounds for Reduction.

A belief by a trial court that damages are excessive is not, standing alone, a sufficient ground for ordering a reduction. Morrison v. Lowe, 274 Ark. 358, 625 S.W.2d 452 (1981).

Record sufficient to find that award of actual and punitive damages was excessive, but that underlying liability determinations were not tainted; therefore remittitur was appropriate. Dees v. Allied Fid. Ins. Co., 655 F. Supp. 10 (E.D. Ark. 1985).

Power of Court.

This section, which provides that in cases where damages are not susceptible of definite measurement a remittitur shall be ordered only where the judgment is rendered under the influence of passion and prejudice, is not the basic authority for the reduction of a jury verdict, since remittitur is within the inherent power of a court. *Morrison v. Lowe*, 274 Ark. 358, 625 S.W.2d 452 (1981).

Reduction improper.

Punitive damages award of \$350,000

16-64-124. Remittitur.

The circuit judge presiding at the trial, if he or she deems the verdict excessive, may, on motion for a new trial filed by the losing party, indicate the amount of the excess. Thereupon, if the losing party offers to file and enter of record a release of all errors that may have accrued at the trial if the prevailing party will remit the amount so deemed excessive and the prevailing party refuses to remit the amount so deemed excessive, the verdict shall be set aside.

History. Acts 1901, No. 125, § 1, p. 196; C. & M. Dig., § 1313; Pope's Dig., § 1538; A.S.A. 1947, § 27-1903.

CASE NOTES**ANALYSIS**

Constitutionality.
Applicability.
Applicability.
Excessive after remittitur.
Grounds for reduction.
Motion for reduction.
Power of court.
Refusal to order.
Scope.

Constitutionality.

The court held this section to be void insofar as it curtailed the appellate jurisdiction of the Supreme Court. Whether this section is void insofar as it affects the jurisdiction of the circuit court was not decided. *Saint Louis & N. Ark. R.R. v. Mathis*, 76 Ark. 184, 91 S.W. 763 (1905).

Applicability.

Where losing party did not waive all errors and where the winning party did not remit the excess, this section does not apply. *Dorey v. McCoy*, 246 Ark. 1244, 442 S.W.2d 202 (1969).

against husband for assaulting his wife did not shock the court's conscience or demonstrate passion or prejudice on the part of the jury. *Cater v. Cater*, 311 Ark. 627, 846 S.W.2d 173 (1993).

Cited: *Jamison v. Spivey*, 197 Ark. 698, 125 S.W.2d 453 (1939); *Dierks Lumber & Coal Co. v. Noles*, 201 Ark. 1088, 148 S.W.2d 650 (1941); *Dorey v. McCoy*, 246 Ark. 1244, 442 S.W.2d 202 (1969).

Applicability.

In a conversion action, the ratio between the punitive-damages award of \$250,000 before the trial court's remittitur was not "grossly excessive" where the compensatory damages award of \$35,000 established an approximate 7:1 ratio, which was well within the acceptable range when reviewing that particular factor under recent United States Supreme Court rulings; on cross-appeal the trial court was ordered to reinstate, upon remand, the original punitive-damages award of \$250,000. *Hudson v. Cook*, 82 Ark. App. 246, 105 S.W.3d 821 (2003).

Excessive after Remittitur.

Where, from all the evidence, the amount awarded by the jury appears excessive and the trial court so found; and where, after the plaintiff had entered a remittitur, the judgment was still grossly excessive and there was no satisfactory evidence from which the Supreme Court could determine what sum should be awarded, the cause should be remanded

for a new trial. *Jamison v. Spivey*, 197 Ark. 698, 125 S.W.2d 453 (1939).

Grounds for Reduction.

Record sufficient to find that award of actual and punitive damages was excessive, but that underlying liability determinations were not tainted; therefore remittitur was appropriate. *Dees v. Allied Fid. Ins. Co.*, 655 F. Supp. 10 (E.D. Ark. 1985).

Motion for Reduction.

Motion for reduction of jury award is held to be in the nature of a request for a remittitur under this section and not a motion for judgment notwithstanding verdict, and its granting is not inconsistent with granting a new trial. *Dorey v. McCoy*, 246 Ark. 1244, 442 S.W.2d 202 (1969).

Power of Court.

Court's action in reducing verdict without requiring filing of release provided by this section was not error, court having inherent power to reduce verdicts to conform to established facts. *Dierks Lumber & Coal Co. v. Noles*, 201 Ark. 1088, 148 S.W.2d 650 (1941).

Refusal to Order.

The trial court did not err in refusing to

order a remittitur of damages for mental anguish and loss of consortium where there was no showing that the verdict was influenced by passion, and the verdict, while high, was not so grossly excessive as to shock the conscience of the court. *Martin v. Rieger*, 289 Ark. 292, 711 S.W.2d 776 (1986).

Scope.

This section is not the basic authority for reduction of a jury verdict by a trial court and it only purports to limit the basic and inherent power of the court in certain cases. *Dorey v. McCoy*, 246 Ark. 1244, 442 S.W.2d 202 (1969).

This section, which provides that in cases where damages are not susceptible of definite measurement a remittitur shall be ordered only where the judgment is rendered under the influence of passion and prejudice, is not the basic authority for the reduction of a jury verdict, since remittitur is within the inherent power of a court. *Morrison v. Lowe*, 274 Ark. 358, 625 S.W.2d 452 (1981).

Cited: *Morrison v. Lowe*, 274 Ark. 358, 625 S.W.2d 452 (1981).

16-64-125. Method of serving judgment on defendant constructively summoned.

The service of the copy of the judgment, if in this state, shall be made and proved in the same manner as the service of a summons and, if out of this state, in the manner prescribed in § 16-58-119 [superseded], as to the service of a copy of the complaint and summons and proof thereof.

History. Civil Code, § 452; C. & M. Dig., § 6267; Pope's Dig., § 8223; A.S.A. 1947, § 27-1909.

16-64-126. Title of bona fide purchasers of property unaffected by new trial.

The title of purchasers in good faith to any property sold under an attachment or judgment shall not be affected by the new trial permitted by ARCP, Rule 59, except the title of property obtained by the plaintiff and not bought of him in good faith by others.

History. Civil Code, § 453; C. & M. Dig., § 6268; Pope's Dig., § 8224; A.S.A. 1947, § 27-1910.

16-64-127 — 16-64-129. [Repealed.]

Publisher's Notes. These sections, concerning transcripts and the record on appeal in equity cases, were repealed by Acts 2003, No. 1185, § 194. The sections were derived from the following sources:

16-64-127. Acts 1915, No. 290, § 19; C. & M. Dig., § 1269; Pope's Dig., § 1493; A.S.A. 1947, § 27-1728.

16-64-128. Acts 1945, No. 196, § 1; 1951, No. 139, §§ 1, 2; A.S.A. 1947, §§ 27-1754 — 27-1756.

16-64-129. Acts 1951, No. 139, §§ 3-7; A.S.A. 1947, §§ 27-1757 — 27-1761.

16-64-130. Punitive damage — Contract involving financial institutions.

(a) For the purposes of this section, the term "financial institutions" means banks, savings and loan associations, and credit unions located within the State of Arkansas and which are insured by an agency of the federal government.

(b) This section shall be applicable in civil actions in which a claim is asserted against a financial institution, whether by complaint, counterclaim, third party complaint, or other pleading. If a claim asserted against a financial institution is determined by the court to be a breach of contract claim arising out of a loan of money or other extension of credit by the financial institution to the person asserting the claim, then punitive damages shall not be awarded to the person asserting the claim unless it is found that the person asserting the claim suffered personal injury or physical damage to property as a result of the financial institution's alleged action or inaction.

History. Acts 1991, No. 532, § 1.

CASE NOTES**Punitive damages not allowed.**

Where a bank had provided recourse financing to a car dealer for 20 years, during that time had executed contracts establishing the terms for such financing, and within months of executing one such contract notified the dealer that it would

not honor the same, the claim involved the issuance of credit; therefore, under this section, the dealer was not entitled to punitive damages in his breach of contract action against the bank. *Bank of Am., N.A. v. C.D. Smith Motor Co.*, 353 Ark. 228, 106 S.W.3d 425 (2003).

CHAPTER 65**JUDGMENTS GENERALLY****SUBCHAPTER.**

1. GENERAL PROVISIONS.
2. JUDGMENT ON MOTION.
3. JUDGMENT BY CONFESSION.
4. DEFAULT JUDGMENT.
5. SURVIVAL AND REVIVAL.
6. SATISFACTION.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 16-65-101, 16-65-102. [Repealed.]
- 16-65-103. Computation of amount of judgment.
- 16-65-104. Computation of special damages.
- 16-65-105. Excess of setoff over claim.
- 16-65-106. Reservation of infant's right to show cause against judgment.
- 16-65-107. Recital of notice.
- 16-65-108. Judgments, orders, sentences, and decrees without notice void.
- 16-65-109. Entry of judgment.
- 16-65-110. Judgments by default.
- 16-65-111. Death of party.
- 16-65-112. Entry of judgment upon order book.

SECTION.

- 16-65-113. Entry into judgment book — Index.
- 16-65-114. Interest on judgments.
- 16-65-115. Passage of title by decree.
- 16-65-116. Recordation of decree of conveyance required.
- 16-65-117. Judgment as lien on land.
- 16-65-118. Liens of officers and attorneys.
- 16-65-119. [Repealed.]
- 16-65-120. Sale or transfer of judgment or cause of action — Filing and noting by clerk.
- 16-65-121. Judgments, etc., effective from date rendered.
- 16-65-122. Records to contain judgment debtors' social security number — Exceptions.

Cross References. Executions may issue on judgments, § 16-66-101.

Limitations on actions on judgment, § 16-56-114.

Effective Dates. Acts 1859, No. 147, § 3: effective on passage.

Acts 1868, No. 9, § 9: effective on passage.

Acts 1891, No. 56, § 3: effective on passage.

Acts 1899, No. 92, § 2: effective on passage.

Acts 1945, No. 55, § 3: Feb. 16, 1945. Emergency clause provided: "Because of the confusion and uncertainty existing in the various counties throughout the State under the present laws relative to the legal fees entitled to be charged by the Circuit and Chancery Clerks and Record-ers in this State for the services they render, an emergency is hereby declared to exist and this act shall take effect and be in force from and after its passage and approval."

Acts 1963, No. 124, § 2: Feb. 28, 1963. Emergency clause provided: "It is hereby found and determined by the General As-sembly that the fee presently provided for recorders for recording, indexing and cross-indexing instruments of writing is not adequate to compensate such record-ers and in fact is working a severe hard-ship on the recorders in the various coun-ties and that this act is immediately

necessary to correct the situation. There-fore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in effect from the date of its passage and approval."

Acts 1977, No. 333, § 6: Mar. 1, 1977. Emergency clause provided: "It is hereby found and determined by the General As-sembly that the establishment of uniform advance fees to be charged for causes of action by the clerks in the various circuit and chancery courts of this State is neces-sary to provide for the efficient operation of said offices and to minimize the neces-sity of maintaining separate accounts for various fees; that the fees charged by county recorders are not now adequate to reimburse the county for the service of recording instruments, and that the im-mediate passage of this Act is necessary to promote the efficient administration of justice in this State and to enable counties to recover reasonable fees for services ren-dered by recorders. Therefore, an emer-gency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1985, No. 782, § 3: Apr. 3, 1985. Emergency clause provided: "It is hereby found and determined by the General As-sembly that the rate of interest on judg-

ments should be assessed in accordance with the amendment to Article XIX, Section 13 of the Constitution of Arkansas which became effective December 2, 1982. Therefore, an emergency is hereby de-

clared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Running of interest on judgment where both parties appeal. 11 ALR 4th 1099.

State statute or rule allowing interest or changing rate of interest on judgments or verdicts. 41 ALR 4th 694.

Am. Jur. 46 Am. Jur. 2d, Judgm., § 1 et seq.

C.J.S. 49 C.J.S., Judgm., § 1 et seq.

16-65-101, 16-65-102. [Repealed.]

Publisher's Notes. These sections, concerning the definition of a judgment, and rendering judgments in a single action against several defendants, were repealed by Acts 1993, No. 1275, § 1. They were derived from the following sources:

16-65-101. Civil Code, § 399; C. & M.

Dig., § 6233; Pope's Dig., § 8189; A.S.A. 1947, § 29-101.

16-65-102. Civil Code, §§ 401, 404; C. & M. Dig., §§ 6235, 6237; Pope's Dig., §§ 8191, 8193; A.S.A. 1947, §§ 29-103, 29-104. For present law, see ARCP 54.

16-65-103. Computation of amount of judgment.

In all judgments or decrees rendered by any court of justice for any debt, damages, or costs, and on all executions issued thereon, the amount shall be computed, as near as may be, in dollars and cents, rejecting smaller fractions. No judgment or other proceeding shall be considered erroneous for such an omission.

History. Rev. Stat., ch. 100, § 2; C. & M. Dig., § 7351; Pope's Dig., § 9390; A.S.A. 1947, § 29-115.

CASE NOTES

In General.

An entry containing a statement that one of the defendants should have paid the plaintiff a certain amount each month but no statement of the amount due plain-

tiff was not a judgment within the meaning of this section, but only findings of fact upon which the judgment should be based. *Thomas v. McElroy*, 243 Ark. 465, 420 S.W.2d 530 (1967).

16-65-104. Computation of special damages.

(a) Where special damages are given by statute and it appears, by the verdict of the jury, or other decision of the action, that the special damages are due and recoverable by one of the parties against the other, the court shall render judgment for that party.

(b) If, in ascertaining the amount of the special damages, it is necessary to assess the value of any property or amount of any debt or

claim, the court may hear the proof and assess the value or amount, or have the assessment made by a jury.

History. Civil Code, § 421; C. & M. Dig., § 6275; Pope's Dig., § 8231; A.S.A. 1947, § 29-114.

CASE NOTES

Judgment Notwithstanding Verdict.

In an action in which special statutory damages are recoverable in addition to wages due, a motion for judgment not-

withstanding a verdict for wages due must be made before judgment is entered on the verdict. *Chaney v. Missouri P.R.R.*, 167 Ark. 172, 267 S.W. 564 (1925).

16-65-105. Excess of setoff over claim.

(a) If a setoff established at the trial exceeds the plaintiff's claim so established, judgment for the defendant must be given for the excess.

(b) If it appears that the defendant is entitled to any other affirmative relief, judgment shall be given therefor.

History. Civil Code, § 419; C. & M. Dig., § 6274; Pope's Dig., § 8230; A.S.A. 1947, § 29-112.

CASE NOTES

Cited: *Auten v. United States Nat'l Bank*, 174 U.S. 125, 19 S. Ct. 628, 43 L. Ed. 920 (1899).

16-65-106. Reservation of infant's right to show cause against judgment.

It shall not be necessary to reserve, in a judgment or order, the right of an infant to show cause against the judgment or order after his or her attaining full age. However, in any case in which, but for this section, such a reservation would have been proper, the infant, within twelve (12) months after arriving at the age of eighteen (18) years, may show cause against the order or judgment.

History. Civil Code, § 423; C. & M. Dig., § 6277; Pope's Dig., § 8233; A.S.A. 1947, § 29-117.

CASE NOTES

ANALYSIS

Decree absolute.
Ejectment.
Land interests.
Liens.
Limitations.

Partnership.
Plaintiffs.
Procedure.
Right of review.

Decree Absolute.

A decree does not become absolute till

the expiration of the time to show cause. *Rankin v. Schofield*, 81 Ark. 440, 98 S.W. 674 (1905).

Ejectment.

Where, in a suit for ejectment, in which an infant is not deprived of his interest in land, the rule that an infant may sue to show cause and set aside the judgment when he attains his majority does not apply. *Paragould Trust Co. v. Perrin*, 103 Ark. 67, 145 S.W. 886 (1912).

Land Interests.

A decree against an infant, divesting his title to land if regularly obtained, is not void but voidable for cause. *Blanton v. Rose*, 70 Ark. 415, 68 S.W. 674 (1902).

Where a decree divests a minor of an interest in lands, he has a right to show cause against the decree within 12 months after arriving at full age. *Purcell v. Gann*, 113 Ark. 332, 168 S.W. 1102 (1914).

Where a conveyance by a father to his infant children was set aside as a fraud upon his creditors, the infants, having an interest in the land which they could divest only by conveyance, are entitled to show cause against the decree within 12 months after arriving at the age of majority. *Berringer v. Stevens*, 145 Ark. 293, 225 S.W. 14 (1920).

In suit to foreclose a trust deed by curator of minors where default decree was rendered for cross-complainant claiming title as purchaser at tax sale, demurrer to minors' motion or complaint to set aside the decree was improperly sustained since proceeding was not a collateral attack on the decree and minors had right to petition for vacation of erroneous judgment. *Arkansas Trust Co. v. Sims*, 198 Ark. 1143, 133 S.W.2d 854 (1939).

Liens.

This section has no application to decrees of foreclosure under liens placed upon the lands of an infant by his ances-

tor. *Estes v. Lucky*, 133 Ark. 97, 201 S.W. 815 (1918); *Shaw v. Polk*, 152 Ark. 18, 237 S.W. 703 (1922).

Limitations.

A suit to set aside a judgment against an infant must be brought within 12 months after the infant attains majority, if not within that period the action is barred the same as an action of an adult. *Ready v. Ozan Inv. Co.*, 190 Ark. 506, 79 S.W.2d 433 (1935).

Partnership.

In an action to wind up a partnership, a decree providing for the service of summons upon a minor and appointment of a guardian and attorney ad litem for the minor is binding on her to the same extent as if she were an adult heir. *James v. Wade*, 200 Ark. 786, 141 S.W.2d 13 (1940).

Plaintiffs.

The sections authorizing a minor to show cause against a judgment or decree after coming of age affords no relief to an infant plaintiff. *Glasscock v. Glasscock*, 98 Ark. 151, 135 S.W. 835 (1911).

This section refers to judgments against infant defendants and an infant plaintiff cannot, upon attaining his majority, have a judgment in his favor set aside because of its inadequacy. *Walker v. Killoren Elec. Co.*, 243 Ark. 752, 421 S.W.2d 893 (1967).

Procedure.

Before a party can take advantage of this section, errors in the judgment must be shown. *Martin v. Gwynn*, 90 Ark. 44, 117 S.W. 754 (1909).

Right of Review.

The right of review of a judgment against a minor exists only where by the former practice it was proper to reserve in the decree his right to show cause. *Paragould Trust Co. v. Perrin*, 103 Ark. 67, 145 S.W. 886 (1912).

Cited: *Jones v. Pond & Decker Mfg. Co.*, 79 Ark. 194, 96 S.W. 756 (1906); *Brake v. Sides*, 95 Ark. 74, 128 S.W. 572 (1910).

16-65-107. Recital of notice.

In all cases where it appears from a recital in the records of any court that actual or constructive notice was given, it shall be evidence of that fact.

History. Acts 1859, No. 147, § 2, p. 172; C. & M. Dig., § 6239; Pope's Dig., § 8195; A.S.A. 1947, § 29-108.

CASE NOTES

ANALYSIS

False return.

Notice.

—Constructive notice.

Presumption.

Recitals.

False Return.

An officer's false return of service of process does not preclude one from showing in proper proceeding that no service was had, and thus be relieved from burden of judgment or decree based on a false return of service. *Husband v. Crockett*, 195 Ark. 1031, 115 S.W.2d 882 (1938).

Notice.

A decree is not subject to collateral attack by infant defendant where the record is otherwise silent as to service of process. *Huggins v. Dabbs*, 57 Ark. 628, 22 S.W. 563 (1893).

Whether a domestic judgment when collaterally attacked, is void for want of notice, is a matter for the court to determine from an inspection of the record. *McDonald v. Ft. Smith & W.R.R.*, 105 Ark. 5, 150 S.W. 135 (1912).

A record which contradicts the finding of service in a decree stultifies itself and the decree is overcome. *Union Inv. Co. v. Hunt*, 187 Ark. 357, 59 S.W.2d 1039 (1933).

—Constructive Notice.

The recital in the record, that constructive notice to a nonresident defendant in chancery has been given by publication, is sufficient. *Coons v. Throckmorton*, 25 Ark. 60 (1867).

A decree in a proceeding by constructive service which recites that notice was given as required by statute, without specifying how notice was given, is valid as against collateral attack. *McLain v. Duncan*, 57 Ark. 49, 20 S.W. 597 (1892).

Presumption.

Where minor heirs-at-law endeavored to have a foreclosure decree vacated after attaining majority because of defective service on them as infants, the court held

that there existed a presumption of service from a recital in the decree of foreclosure that could not be attacked collaterally. *Boyd v. Roane*, 49 Ark. 397, 5 S.W. 704 (1887).

The statutory presumption in favor of the recital in a record of service of process is not overcome by the fact that the record contains a copy of the summons without any return of service endorsed thereon. *White v. Smith*, 63 Ark. 513, 39 S.W. 555 (1897).

Where a decree recited that the defendants "were duly served with summons as required by law," it will be presumed that defendants were duly summoned. *Love v. Kaufman*, 72 Ark. 265, 80 S.W. 884 (1904).

Recitals.

The recital in a judgment of the county court barring county warrants which had been called in for examination and reissue, that due notice of the order calling in the warrants had been given, is conclusive evidence of that fact. *Newton v. Askew*, 53 Ark. 476, 14 S.W. 670 (1890).

On a direct attack, recitals in a judgment that defendants, though served with summons, failed to appear were prima facie evidence of the fact stated and must be taken as true unless there is testimony to contradict them or tending to show to the contrary. *First Nat'l Bank v. Dalsheimer*, 157 Ark. 464, 248 S.W. 575 (1923).

In an action to set aside a default foreclosure decree, the evidence was held insufficient to prove want of service as against recitals of the decree showing service. *Davis v. Ferguson*, 164 Ark. 340, 261 S.W. 905 (1924).

A recital in the record of a court imparts absolute verity, and parties thereto are estopped from denying its truth. Recital of service is prima facie evidence of the fact. *Fidelity Mtg. Co. v. Evans*, 168 Ark. 459, 270 S.W. 624 (1925).

The evidence was held to make a prima facie showing of a meritorious defense to authorize a judgment obtained without service to be set aside on direct attack.

First Nat'l Bank v. Turner, 169 Ark. 393, 275 S.W. 703 (1925).

Recitals in a judgment showing legal

service are conclusive in the absence of fraud. Kindrick v. Capps, 196 Ark. 1169, 121 S.W.2d 515 (1938).

16-65-108. Judgments, orders, sentences, and decrees without notice void.

All judgments, orders, sentences, and decrees made, rendered, or pronounced by any of the courts of the state against anyone without notice, actual or constructive, and all proceedings had under judgments, orders, sentences, or decrees shall be absolutely null and void.

History. Acts 1859, No. 147, § 1, p. 172; C. & M. Dig., § 6238; Pope's Dig., § 8194; A.S.A. 1947, § 29-107.

RESEARCH REFERENCES

Ark. L. Rev. Comment, Service of Process — Default Judgment, etc., 40 Ark. L. Rev. 381.

CASE NOTES

ANALYSIS

In general.
Applicability.
Intervention.
Issue raised.
Judgment void.
Notice.
— Constructive service.
— Presumption.
Pleadings.
Service of process.
Supersession.
Writ of garnishment.

In General.

Judgment without notice to parties is void. Townsly-Myrick Dry Goods Co. v. Fuller, 58 Ark. 181, 24 S.W. 108 (1893); Grinstead v. Wilson, 69 Ark. 587, 65 S.W. 108 (1901).

Applicability.

This section was not applicable to order of chancery court restraining parties from entering property. Arkansas State Hwy. Comm'n v. Hammock, 201 Ark. 927, 148 S.W.2d 324 (1941).

Sureties, having made themselves parties to the suit by entering into the appeal bond, are not entitled to notice before decree against them. Whetstone v. Atlas Drilling & Prod. Co., 241 Ark. 487, 409 S.W.2d 322 (1966).

This section is not applicable to an order to the Workers' Compensation Commission. Dura Craft Boats, Inc. v. Daugherty, 247 Ark. 125, 444 S.W.2d 562 (1969).

Intervention.

Although the State of Arkansas was indeed a party to the litigation, the Arkansas Game and Fish Commission and the Arkansas Soil and Water Conservation Commission were not parties to the litigation and, therefore, the chancery court erred by assuming jurisdiction over the commissions and a judgment ordering them to monitor the level of a lake was void. Taylor v. Zanone Props., 342 Ark. 465, 30 S.W.3d 74 (2000).

Issue Raised.

Where complaint based on a foreclosure to land stated that no notice of the land sale had been given, the court held the issue of the lack of notice was raised by the pleadings. Beck v. Rhoads, 235 Ark. 619, 361 S.W.2d 545 (1962).

Judgment Void.

Any judgment rendered in vacation is invalid. Biffle v. Jackson, 71 Ark. 226, 72 S.W. 566 (1903).

An overdue tax sale based on a judgment rendered by a special judge at an adjourned term of the court held on a day

when the regular judge was holding the regular term of court in another county in the same circuit is a nullity. *Caldwell v. Barrett*, 71 Ark. 310, 74 S.W. 748 (1903).

Where in order to have rights in certain lands determined court confirmed title in one of defendants without the defendant having filed a cross-complaint and without notice to the other defendants and without any sort of pleadings which would authorize the decree, the judgment was void on the face of the record and not res judicata. *Woolfolk v. Davis*, 225 Ark. 722, 285 S.W.2d 321 (1955).

Under this section the defendant does not seek a trial, but asks that the judgment be declared void. *White v. Ray*, 267 Ark. 83, 589 S.W.2d 28 (1979).

In cases where judgments are void, no proof of a meritorious defense is necessary to set aside judgment. *Cole v. First Nat'l Bank*, 304 Ark. 26, 800 S.W.2d 412 (1990).

The doctrine res judicata or election of remedies do not apply when the out-of-state judgment on the issues in controversy has been declared void. *Sides v. Kirchoff*, 316 Ark. 680, 874 S.W.2d 373 (1994).

Although the State of Arkansas was indeed a party to the litigation, the Arkansas Game and Fish Commission and the Arkansas Soil and Water Conservation Commission were not parties to the litigation and, therefore, the chancery court erred by assuming jurisdiction over the commissions and a judgment ordering them to monitor the level of a lake was void. *Taylor v. Zanone Props.*, 342 Ark. 465, 30 S.W.3d 74 (2000).

Notice.

A judgment of a court of general jurisdiction rendered without service of summons without the statutory written notice cannot be assailed if the defendant in the judgment had actual notice. *Renfroe v. Parmelee*, 143 Ark. 547, 220 S.W. 816 (1920).

Court may cause notice to be given when necessary to serve the purpose of justice, but plaintiff, having invoked the jurisdiction of the court, must take notice of the regular or adjourned sessions thereof. *Berry v. Sims*, 195 Ark. 326, 112 S.W.2d 25 (1938).

Where the uncontradicted testimony was to the effect that appellants had no notice of any kind, that the foreclosure

suit would be or was, in fact, filed in this case, then the foreclosure decree, together with the deeds based thereon, would be subject to collateral attack. *Beck v. Rhoads*, 235 Ark. 619, 361 S.W.2d 545 (1962).

An order dismissing plaintiff's complaint without prejudice, entered without notice while the court was not in session, was void and was properly set aside without the filing of a verified complaint therefor by the plaintiff. *Pepsi-Cola Bottling Co. v. Steel*, 245 Ark. 284, 431 S.W.2d 854 (1968).

Where the plaintiff did not demonstrate that sufficient inquiry was made in attempting to ascertain appellant's last known address and thereby deprive him of "reasonably probable" actual notice consistent with due process and the substitute service statute § 16-58-121 (a) and (b) was not sufficiently complied with, the default judgment was void. *Halliman v. Stiles*, 250 Ark. 249, 464 S.W.2d 573 (1971).

On motion to set aside default judgment on ground of defective service of process where service was invalid, judgment was void ab initio. *Edmonson v. Farris*, 263 Ark. 505, 565 S.W.2d 617 (1978).

This section has to do with a judgment entered without any notice whatever, not merely without formal notice. *White v. Ray*, 267 Ark. 83, 589 S.W.2d 28 (1979).

A summons notice to be valid must be reasonably calculated to make the defendant aware of his duty to take action or risk entry of a default judgment; judgments by default rendered without valid service of notice are judgments rendered without jurisdiction and are therefore void. *Tucker v. Johnson*, 275 Ark. 61, 628 S.W.2d 281 (1982). But see *Southern Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998).

—Constructive Service.

A judgment enforcing an attachment on land based on constructive service will not be quashed on certiorari because sheriff's return was defective if the judgment defendant had an adequate remedy at law allowing parties against whom judgment is rendered on constructive service two years in which to come into court and move to have case retried. *Gates v. Hoyes*, 69 Ark. 518, 64 S.W. 271 (1901).

A judgment based on constructive ser-

vice by publication is void where a warning order was not made upon the complaint. *Beidler v. Beidler*, 71 Ark. 318, 74 S.W. 13 (1903).

A decree of divorce based upon constructive service by publication without actual service is void where her name was given in the complaint, warning order, and decree was erroneous. *Grober v. Clements*, 71 Ark. 565, 76 S.W. 555 (1903).

Where a resident defendant is served with constructive service, the proceedings are null and void. *Barksdale v. Barksdale*, 170 Ark. 228, 279 S.W. 789 (1926).

—Presumption.

Where infant heirs and their guardian ad litem were served with process in a suit to foreclose mortgage, and no attempt was made to vacate decree until all party defendants had attained 21 years, then all joined in action to vacate judgment on grounds that process had been defective, it was held that the presumption of service was conclusive from the record and could not be contradicted by evidence. *Boyd v. Roane*, 49 Ark. 397, 5 S.W. 704 (1887).

A presumption of regularity attends a judgment of a superior court of general jurisdiction which can be controverted only by showing that there was no notice and that a meritorious defense existed which could have been asserted notwithstanding this section. *Sovereign Camp W.O.W. v. Wilson*, 136 Ark. 546, 207 S.W. 45 (1918).

Pleadings.

When a motion alleges that the judgment is void, and the challenge is based on

this section, the movant who had no notice of the suit against him need not allege a meritorious defense to have the judgment set aside. *Green v. Yarbrough*, 299 Ark. 175, 771 S.W.2d 760 (1989).

Service of Process.

Because service of process was insufficient to give notice, the default judgment was void ab initio. *State Office of Child Support Enforcement v. Mitchell*, 330 Ark. 338, 954 S.W.2d 907 (1997).

Supersession.

The reporter's notes to A.R.C.P., Rule 71, suggest that this section is superseded, but if this section is superseded by Rule 71 it is only to the extent necessary "for enforcing obedience" to orders of the court, and is expressly not superseded with respect to judgments by default. *Tucker v. Johnson*, 275 Ark. 61, 628 S.W.2d 281 (1982). But see *Southern Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998).

Writ of Garnishment.

Where a writ of garnishment served as summons in an action but failed to notify the garnishee that failure to answer could result in judgment against him, proper notice was not given which was a fatal defect in the writ. *DeSoto, Inc. v. Crow*, 257 Ark. 882, 520 S.W.2d 307 (1975).

Cited: *Halliman v. Stiles*, 250 Ark. 249, 464 S.W.2d 573 (1971); *Davis v. Schimmel*, 252 Ark. 1201, 482 S.W.2d 785 (1972); *Edmonson v. Farris*, 263 Ark. 505, 565 S.W.2d 617 (1978); *Southern Paper Box Co. v. Houston*, 15 Ark. App. 176, 690 S.W.2d 745 (1985).

16-65-109. Entry of judgment.

(a) When a trial by a jury has been had, judgment must be entered by the clerk in conformity with the verdict, unless it is special or the court orders the case to be reserved for future argument or consideration.

(b) When the verdict is special, where there has been a special finding upon particular questions of fact or where the court has ordered the case to be reserved, the court shall order what judgment shall be entered.

History. Civil Code, §§ 416, 417; C. & M. Dig., §§ 6271, 6272; Pope's Dig., §§ 8227, 8228; A.S.A. 1947, §§ 29-109, 29-110.

CASE NOTES

ANALYSIS

In general.
Interest.
Time of entry.

In General.

Judgment will be entered in conformity to the verdict unless (1) the verdict is special and the court reserves the case for further consideration or (2) a party is entitled to judgment upon the pleadings notwithstanding the verdict. *Powers v. Wood Parts Corp.*, 184 Ark. 1032, 44 S.W.2d 324 (1931).

Interest.

The court has no power to add interest to the verdict of a jury in rendering verdicts. *Hallum v. Dickinson*, 47 Ark. 120, 14 S.W. 477 (1886).

Inclusion of interest in judgment in eminent domain proceeding does not violate this section requiring judgment to con-

form to verdict, since an eminent domain proceeding while in the nature of a suit for damages is actually an action to determine value of land taken. *Arkansas State Hwy. Comm'n v. Stupenti*, 222 Ark. 9, 257 S.W.2d 37 (1953).

Time of Entry.

Where a decree entered upon the record of the chancery court purports to have been rendered on a day when the court was in session, though it was entered upon the record after the entry of an order adjourning the court for the term, it will be presumed that the decree was rendered in term time and not in vacation. *Fiddymment v. Bateman*, 97 Ark. 76, 133 S.W. 192 (1910).

Cited: *Missouri Pac. Transp. Co. v. Sharp*, 194 Ark. 405, 108 S.W.2d 579 (1937); *Henderson v. Skerczak*, 247 Ark. 446, 446 S.W.2d 243 (1969).

16-65-110. Judgments by default.

(a) Judgments by default rendered by the circuit courts may be recorded in a separate book for that purpose.

(b) The orders showing the rendition of these judgments by default shall be signed by the circuit judge.

History. Civil Code, § 424; C. & M. Dig., § 2229; Pope's Dig., § 2857; A.S.A. 1947, § 29-122.

RESEARCH REFERENCES

Ark. L. Rev. Note, Setting Aside Default Judgments in Arkansas, 45 Ark. L. Rev. 971.

16-65-111. Death of party.

(a) If, after a verdict is rendered in any action, either party dies before judgment is actually entered thereon, the court may at any time during the term at which the verdict was rendered enter final judgment in the names of the original parties.

(b) Nothing in subsection (a) of this section shall be construed to authorize the entry of the judgment against any party who may have died before a verdict was actually rendered against him or her, notwithstanding he or she may have died on the first day or any other day of the term at which the verdict may have been rendered. Such a verdict shall be void.

History. Rev. Stat., ch. 1, §§ 11, 12; C. §§ 1531, 1532; A.S.A. 1947, §§ 29-105, & M. Dig., §§ 1306, 1307; Pope's Dig., 29-106.

CASE NOTES

Nunc Pro Tunc Order.

Where a cause has been submitted in the Supreme Court, if either party dies before final judgment, the judgment may be rendered in the names of the original parties as of a day previous to the death;

or, if the death of either party is suggested and proved, a nunc pro tunc order may be made to extend back to a day between the submission and death. *Pool v. Loomis*, 5 Ark. (5 Pike) 110 (1843).

16-65-112. Entry of judgment upon order book.

The judgment must be entered upon the order book and must specify clearly the relief granted or other determination of the action.

History. Civil Code, § 422; C. & M. Dig., § 6276; Pope's Dig., § 8232; A.S.A. 1947, § 29-116.

CASE NOTES

ANALYSIS

Allowance to widow.
Court memorandum.
Duty of clerk.

Allowance to Widow.

Where allowance to administratrix, as deceased's widow, out of decedent's personalty, was made without minor child whose interests were affected and for whom no defense was made, being a party to the proceeding, minor had 12 months after coming of age in which to move to have the order vacated. *Moudy v. Bradley*, 200 Ark. 630, 140 S.W.2d 113 (1940).

Court Memorandum.

In action for divorce where a memorandum of the court sets out that certain

realty is held by the parties as an estate by the entirety, but does not set forth whether it will be continued as such and does not set visitation rights of the husband, the memorandum does not clearly specify the relief granted as required by this section and therefore is not a decree. *O'Dell v. O'Dell*, 247 Ark. 635, 447 S.W.2d 330 (1969).

Duty of Clerk.

It is the duty of the clerk to make a record of what the court orders and adjudges. *Stanton v. Arkansas Democrat Co.*, 194 Ark. 135, 106 S.W.2d 584 (1937).

Cited: *McConnell v. Bourland*, 175 Ark. 253, 299 S.W. 44 (1927); *Poe v. Walker*, 183 Ark. 659, 37 S.W.2d 866 (1931).

16-65-113. Entry into judgment book — Index.

(a) The clerk must keep among the records of the court a book to be called the judgment book.

(b) The entry in the judgment book must show the names of the plaintiff and defendant and, if more than one, then of the first-named of each in the pleadings with the words "and others", the term at which the judgment was entered, and a reference to the order book and page at which the judgment is to be found, with a space left for the entry of the satisfaction of the judgment.

(c)(1) The clerk shall immediately after the rendition of any judgment or decree enter it in the judgment book, in which shall be alphabetically cross-indexed all the judgments of the court, according to

the surnames of the plaintiff and defendant. If there is more than one (1) plaintiff or defendant, then the names of all plaintiffs and defendants shall be so indexed and cross-indexed.

(2) It shall be so arranged that all the judgments in the case of plaintiffs whose surnames commence with the same letter and all of each term shall immediately succeed each other.

History. Rev. Stat., ch. 84, § 31; Civil Code, § 424; Acts 1909, No. 17, § 1, p. 26; C. & M. Dig., § 6282; Pope's Dig., § 8238; A.S.A. 1947, §§ 29-118, 29-120, 29-121.

A.C.R.C. Notes. The Supreme Court

of Arkansas stated in a Per Curiam of Nov. 24, 1986, that subsection (b) of this section was deemed superseded by the Arkansas Rules of Civil Procedure.

16-65-114. Interest on judgments.

(a) Interest on any judgment entered by any court or magistrate on any contract shall bear interest at the rate provided by the contract or ten percent (10%) per annum, whichever is greater, and on any other judgment at ten percent (10%) per annum, but not more than the maximum rate permitted by the Arkansas Constitution, Article 19, § 13, as amended.

(b) No judgment rendered or to be rendered against any county in the state on county warrants or other evidence of county indebtedness shall bear any interest after the passage of this act.

History. Acts 1868, No. 9, § 2, p. 32; 1893, No. 78, § 1, p. 145; C. & M. Dig., § 7360; Pope's Dig., § 9399; Acts 1975, No. 474, § 1; 1985, No. 782, § 1; A.S.A. 1947, § 29-124.

Publisher's Notes. In reference to the

term "passage of this act," Acts 1985, No. 782, § 3, provided that the act would take effect from and after its passage. The act was signed by the Governor on April 3, 1985.

RESEARCH REFERENCES

Ark. L. Notes. Matthews, Interest Rate Provisions and the Negotiability of Commercial Paper, 1986 Ark. L. Notes 37.

Brill, A Primer on Judgment and Pre-Judgment Interest in Arkansas, 1989 Ark. L. Notes 1.

Ark. L. Rev. Insurance — Insurer's

Undertaking in Liability Policy for Interest on Judgment in Excess of Policy Limits, 14 Ark. L. Rev. 112.

Note, Compound Pre-Judgment Interest as an Element of Just Compensation: *Wilson v. City of Fayetteville*, 47 Ark. L. Rev. 937.

CASE NOTES

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Constitutionality.

This section is not violative of Ark. Const., Art. 2, §§ 8, 17. *Read v. Mississippi County*, 69 Ark. 365, 63 S.W. 807 (1901), *aff'd*, 188 U.S. 739, 23 S. Ct. 849, 47 L. Ed. 677 (1903).

This section does not violate the contract clause nor the due process clause of the federal Constitution. *Missouri & Ark. Lumber & Mining Co. v. Greenwood Dist.*, 249 U.S. 170, 39 S. Ct. 202, 63 L. Ed. 538 (1919).

In General.

As a general rule, judgments bear interest. *Taylor v. Corning Bank & Trust Co.*, 185 Ark. 691, 48 S.W.2d 1102 (1932).

All judgments should bear interest except those expressly excluded. *Shofner v. Jones*, 201 Ark. 540, 145 S.W.2d 350 (1940).

Ark. Const., Art. 19, § 13 has nothing to do with interest on a judgment amount. *Gavin v. Gavin*, 319 Ark. 270, 890 S.W.2d 592 (1995).

Construction.

The language of this section providing for an interest award of 10 percent on a judgment is mandatory barring discretionary reduction by the trial court. *Rest Hills Mem. Park v. Clayton Chapel Sewer Imp. Dist. No. 233*, 6 Ark. App. 180, 639 S.W.2d 519 (1982).

Based on a review of the history and plain language of subsection (a) if this section and the emergency clause of Acts 1985, No. 782, § 3, the legislature intended the interest rate limitation in Ark. Const. art. 19, § 13 to apply to limit judgments in all cases, and *Carroll Elec. Coop. Corp v. Carlton*, 319 Ark. 555, 892 S.W.2d 496 (1995) and *Gavin v. Gavin*, 319 Ark. 270, 890 S.W.2d 592 (1995) are overruled to the extent they conflict with the rule; therefore, a 10 percent post-judgment interest award in a tort case was erroneous because it exceeded the 8.25 interest rate allowed in the particular case under Ark. Const. art. 19, § 13. *Hartford Fire Ins. Co. v. Sauer*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 394 (June 17, 2004).

Purpose.

The purpose of interest on judgments is to compensate the judgment creditor for the fact that he had not had the use of a certain sum of money that has been adjudged to be his. *Equifax, Inc. v. Luster*, 463 F. Supp. 352 (E.D. Ark. 1978), aff'd sub nom., *Arkansas La. Gas Co. v. Luster*, 604 F.2d 31 (8th Cir. 1979).

Discretion of Court.

In action for personal injuries where trial judge was unaware of his discretion

in fixing rate of interest on judgment between ten percent and six percent and set the amount at six percent because he understood legal rate to be six percent in absence of contract for higher rate, the judgment on appeal was modified to provide an interest rate of ten percent. *Dunn v. Brimer*, 259 Ark. 855, 537 S.W.2d 164 (1976).

Where evidence in a condemnation action, showed that the trial judge did not actually exercise his discretion to override the mandatory language of this section providing for an interest award of 10 percent on any judgment, the land owners were entitled to an interest award of 6 percent from the date of the order of entry to the time of judgment, and at a rate of 10 percent from the date of the trial court's judgment until satisfaction. *Rest Hills Mem. Park v. Clayton Chapel Sewer Imp. Dist. No. 233*, 6 Ark. App. 180, 639 S.W.2d 519 (1982).

Chancellor erred by simply imposing a rate of six percent instead of the rate prescribed by subsection (a) of this section. *Chambers v. Manning*, 315 Ark. 369, 868 S.W.2d 64 (1993).

Entire Amount.

Where judgment is rendered for the principal of a debt and interest, the entire judgment, including interest, will thereafter bear interest. *Soudan Planting Co. v. Stevenson*, 100 Ark. 384, 140 S.W. 271 (1911).

Entire Judgment.

In an action against a tort defendant's insurer, the judgment creditor of the tort judgment was entitled to interest on the entire judgment, even though it exceeded the policy limits. *Southern Farm Bureau Cas. Ins. Co. v. Robinson*, 236 Ark. 268, 365 S.W.2d 454 (1963); *Southern Farm Bureau Cas. Ins. Co. v. Robinson*, 238 Ark. 159, 379 S.W.2d 8 (1964).

Where execution on judgment against tortfeasor was returned unsatisfied and the judgment creditor then obtained judgment for a lesser amount against the defendant's insurer, he was entitled in addition thereto to interest on the original judgment. *Southern Farm Bureau Cas. Ins. Co. v. Robinson*, 238 Ark. 159, 379 S.W.2d 8 (1964).

Final Judgment.

The probate court did not err in refusing to award interest pursuant to an order

entered in 1987 finding that appellants were entitled to a sum from an estate, where the 1987 order was entered by agreement, and the order made it clear that the "judgment" was not due and owing, but was subject to a determination "at some later date" that sufficient funds existed, "then and only then will the judgment be paid"; this order by its own terms was not a final determination of an amount payable from the estate. *Estate of Otto v. Estate of Fair*, 316 Ark. 674, 875 S.W.2d 487 (1994).

Miscellaneous Awards.

With regard to awards made in condemnation proceedings by the state highway commission, § 27-67-316 is the more specific provision and controls over this section. *Arkansas State Hwy. Comm'n v. Scott*, 264 Ark. 397, 571 S.W.2d 607 (1978).

Where the Public Service Commission ordered the telephone company to pay interest at the rate of ten percent per annum upon refunds that it ordered, the commission did not abuse its discretion in view of this section allowing interest at the rate of ten percent per annum on judgments in favor of creditors, unless the court rendering the judgment, in its discretion, reduces the rate. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

In action by taxpayers against city challenging ordinance levying privilege tax against waterworks commission, award of post-judgment interest was correct; since judgments against municipalities are not excluded in this section, the judgment entered would bear interest until paid at the rate of ten percent per annum. *City of Little Rock v. Cash*, 277 Ark. 494, 644 S.W.2d 229 (1982), cert. denied, 462 U.S. 1111, 103 S. Ct. 2464, 77 L. Ed. 2d 1344 (1983).

Post-judgment interest was properly ordered to accrue not only on the jury award but also on the court's prejudgment interest award since the purpose of awarding interest would be frustrated if party were not compensated for the loss of use of all of his money, both before and after judgment. *Hopper v. Denham*, 281 Ark. 84, 661 S.W.2d 379 (1983).

Post-judgment award of interest at a rate of ten percent was not an abuse of

discretion by the trial court where court considered economic conditions and the prevailing rate of interest in conformity with the purpose of awarding post-judgment interest, which is to compensate the judgment creditor for the loss of the use of money adjudged to be his. *Hopper v. Denham*, 281 Ark. 84, 661 S.W.2d 379 (1983).

Post-judgment interest rate of 6.25 percent on non-contract damages imposed by a trial court was proper as the 10 percent post-judgment interest that the prevailing party sought was not awardable if it exceeded the amount allowed by the Arkansas Constitution. *Superior Fed. Bank v. Mackey*, 84 Ark. App. 1, 129 S.W.3d 324 (2003).

Multiple Defendants.

Where the injured party plaintiff got a judgment in another state against the insured, which was unsatisfied, and plaintiff got another judgment in Arkansas against the insurer, the plaintiff is entitled to interest on the foreign judgment until it is reduced to an Arkansas judgment and interest on the Arkansas judgment from the date of its entry to the date of the trial as a matter of law. *Southern Farm Bureau Cas. Ins. Co. v. Robinson*, 236 Ark. 268, 365 S.W.2d 454 (1963).

Period of Interest.

Where judgment was rendered for plaintiff on its claim and for a lesser amount for defendant on its counterclaim, reversed on appeal from the counterclaim judgment and, on retrial, again rendered for the original amounts, plaintiff was entitled to interest only on the difference between the two judgments from the date of the original judgment. *Ralston Purina Co. v. Parsons Feed & Farm Supply, Inc.*, 416 F.2d 207 (8th Cir. 1969).

Interest on a judgment ran until the amount of the judgment was paid either into court or directly to the parties entitled to receive payment. *Equifax, Inc. v. Luster*, 463 F. Supp. 352 (E.D. Ark. 1978), aff'd sub nom., *Arkansas La. Gas Co. v. Luster*, 604 F.2d 31 (8th Cir. 1979).

In a suit by subcontractors to recover from the general contractor for its alleged breach of two contracts, the subcontractors were entitled to 6 percent interest from the date of the filing of their complaints, even though they did not recover

the sums sought, and to 10 percent interest following judgment. *Advance Constr. Co. v. Dunn*, 263 Ark. 232, 563 S.W.2d 888 (1978).

Both prejudgment and postjudgment interest should have been awarded upon a jury determination of damages. *TB of Blytheville, Inc. v. Little Rock Sign & Emblem, Inc.*, 328 Ark. 688, 946 S.W.2d 930 (1997).

Judgment interest was calculated from the entry of the original judgment in which damages were found payable from a construction company to a homeowner, not from the date of entry of recalculated damages following an appeal. *Glover v. Woodhaven Homes, Inc.*, 346 Ark. 397, 57 S.W.3d 211 (2001).

When a judgment has been appealed, and the appellate decision does not result in an actual reversal of the judgment, interest begins accruing from the date of the original judgment; thus, in an action for personal injuries resulting from an auto accident, where the trial court erred in severing an under-insured motorist carrier without requiring it to be bound by the verdict in the original trial, but neither the judgment in favor of the carrier's policy holder nor the award of damages were reversed, it was proper to award postjudgment interest from the date of judgment in the original trial. *S. Farm Bureau Cas. Ins. Co. v. Brinker*, 350 Ark. 15, 84 S.W.3d 846 (2002).

Because the action involved a controversy over what the subcontractor did correctly and did not do correctly and the damages were hotly contested, the court refused to award prejudgment interest. *Ray & Sons Masonry Contrs., Inc. v. United States Fid. & Guar. Co.*, 353 Ark. 201, 114 S.W.3d 189 (2003).

Probate Court Order.

Probate court's order of allowance of a claim against an estate was a judgment, and claimant is entitled to interest from date of allowance, though payment was delayed because there was no satisfactory market for assets of the estate. *Shofner v. Jones*, 201 Ark. 540, 145 S.W.2d 350 (1940).

Rate.

Where statutory rate of interest was increased to 10 percent before trial to recover amounts due under a contract, a

10 percent interest would apply to the judgment obtained by the contractor, even though the statutory rate of interest on judgments was only 6 percent when the contracts were made. *Love v. H.F. Constr. Co.*, 261 Ark. 831, 552 S.W.2d 15 (1977).

Although the judgment debtor's appeal and consequent delay in satisfying the debt was not unreasonable, debtor knew interest would run, and the judgment creditor was deprived of its money during that time, interest at the rate of 10 percent is applicable. *Equifax, Inc. v. Luster*, 463 F. Supp. 352 (E.D. Ark. 1978), *aff'd* sub nom., *Arkansas La. Gas Co. v. Luster*, 604 F.2d 31 (8th Cir. 1979).

Judgment providing for interest per annum on the judgment lower than the statutory rate was invalid. *Carroll Elec. Coop. Corp. v. Carlton*, 319 Ark. 555, 892 S.W.2d 496 (1995).

Where judgment was rendered in favor of a car dealer in its action against a bank arising from the breach of a contract for recourse financing under subsection (a) of this section, the trial court erred by awarding post-judgment interest at a rate of six and one-quarter percent because there was no evidence in the record of what the Federal Reserve Discount Rate, which under Ark. Const. art. 19, § 13, was the baseline for determining whether the interest rate was unconstitutionally excessive, was at the time the contract was signed; hence, the judgment was reversed as to the interest rate and the case was remanded for determination of the proper interest rate based on the Federal Reserve Discount Rate at the time the contract at issue was executed. *Bank of Am., N.A. v. C.D. Smith Motor Co.*, 353 Ark. 228, 106 S.W.3d 425 (2003).

Cited: *International Harvester Co. v. Burks Motors, Inc.*, 252 Ark. 816, 481 S.W.2d 351 (1972); *Sharum v. Dodson*, 264 Ark. 57, 568 S.W.2d 503 (1978); *Box v. Dudeck*, 265 Ark. 165, 578 S.W.2d 567 (1979); *Edwards v. Arkansas Power & Light Co.*, 683 F.2d 1149 (8th Cir. 1982); *Crittenden County v. Williford*, 283 Ark. 289, 675 S.W.2d 631 (1984); *Tandy Corp. v. Bone*, 283 Ark. 399, 678 S.W.2d 312 (1984); *Watson v. Miears*, 612 F. Supp. 1235 (W.D. Ark. 1984); *City of Jacksonville v. Venhaus*, 302 Ark. 204, 788 S.W.2d 478 (1990); *Bank of Bearden v. Simpson*, 305 Ark. 326, 808 S.W.2d 341 (1991).

(b)(1) No such judgment shall be a lien on the land of the defendant in any other county until a certified copy of the judgment is filed in the office of the clerk of the circuit court of the county in which the land lies.

(2) As to any person who does not have actual notice of the rendition of the judgment, the judgment shall be a lien from the date the judgment is recorded and indexed by the court clerk in a manner that provides reasonable notice to the public.

(c)(1) The clerk, on the filing in his office of a certified copy of a judgment of any of the courts mentioned in subsection (a) of this section, and upon the payment of three dollars (\$3.00), shall immediately proceed to docket and index the judgment in the same manner as though rendered in the court of his or her own county. From that time, the judgment shall be a lien on the defendant's lands in that county.

(2) It shall be the duty of the court clerk to index each judgment immediately upon filing it in the permanent records of the judgments of the court. For purposes of this section, the term "judgments" shall include any order, decree, or judgment which contains a provision for payment of money for the support and care of any child or children through the registry of the court.

(d) The liens authorized by this section shall continue in force for ten (10) years from the date of the judgment and may be revived. A transcript of the judgment of revivor, when filed in other counties, shall have the same and like effect as a judgment of revivor has in the county in which it is rendered.

History. Acts 1891, No. 56, §§ 1, 2, p. 92; C. & M. Dig., §§ 6299, 6300; Pope's Dig., §§ 8255, 8256; Acts 1945, No. 55, § 2; 1959, No. 182, § 1; 1963, No. 124, § 1; 1977, No. 333, § 3; 1985, No. 228, § 1; A.S.A. 1947, §§ 12-1720, 29-130, 29-131; Acts 1987, No. 356, § 1; 1989, No. 931, § 1; 1993, No. 1179, § 1; 1995, No. 475, § 1.

A.C.R.C. Notes. Acts 1977, No. 333, § 4, codified as § 21-6-101, provides that

the appropriate fee prescribed by that section shall be in lieu of the fee prescribed by this section.

Publisher's Notes. Acts 1985, No. 228, § 3, provided that the provisions of the act would be applicable only to the liens of judgments rendered or revived on or after June 28, 1985.

Cross References. Child support, § 9-14-101 et seq.

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Family Law, 8 UALR L.J. 577.

Survey — Debtor-Creditor, 10 UALR L.J. 573.

CASE NOTES

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Construction.

This section should be read together and regarded as a statute creating a lien and declaring its terms. *Lion Oil Ref. Co. v. Rex Oil Co.*, 195 Ark. 1021, 115 S.W.2d 556 (1938).

Applicability.

This section does not apply to land of grantor in a deed placed in escrow before judgment. *Snow Bros. Hdwe. Co. v. Ellis*, 180 Ark. 238, 21 S.W.2d 162 (1929).

Chancery Court.

Money decree in chancery court became a lien upon defendant's real property in the county on the date of rendition. In re *Van Meter*, 135 F. Supp. 781 (W.D. Ark. 1955).

Complaint.

A complaint does not constitute a lien on land until it is reduced to judgment. *Bank of Cave City v. Abstract & Title Co.*, 38 Ark. App. 65, 828 S.W.2d 852 (1992).

Conveyances.

A judgment is not a lien on land which judgment debtor has conveyed to defraud creditors. *Doster v. Manistee Nat'l Bank*, 67 Ark. 325, 55 S.W. 137 (1900).

A lien may be fixed by levy of an execution on lands which have been fraudulently conveyed by a debtor, prior to the rendition of the judgment against him. *Merchants & Farmers Bank v. Harris*, 113 Ark. 100, 167 S.W. 706 (1914).

Where evidence showed that deed from mother to daughter was executed four days after recording of certified copy of judgment against the mother and was executed for purpose of defrauding creditors, the deed could not defeat right of purchaser of land involved at sheriff's sale to obtain possession thereof. *Board v. Van Houten*, 229 Ark. 168, 313 S.W.2d 843 (1958).

Equitable Estate.

The equitable estate of a judgment-defendant is bound by the lien of the judgment. *Cohn v. Hoffman*, 50 Ark. 108, 6 S.W. 511 (1887).

Execution.

Mere delay to sue out an execution during the time prescribed by law for the

continuance of the judgment-lien would not, of itself, be sufficient to displace the lien; nor would the issuance and return of an execution without action, by order of the plaintiff, discharge the lien, or postpone it, in favor of a subsequent judgment-lien. *Shall v. Biscoe*, 18 Ark. (5 Barber) 142 (1856).

Where commissioner of revenues obtained judgment on certificate of indebtedness for gasoline taxes but did not procure a writ of scire facias or execution to collect or preserve its judgment, the right of the state to claim a lien was barred after three years (now ten years), since lien is not excepted from the three-year (now ten-year) limitation provided for liens of judgments. *Lion Oil & Ref. Co. v. Rex Oil Co.*, 195 Ark. 1021, 115 S.W.2d 556 (1938).

Judgment lien expires within three years after its rendition, unless revived, but judgment creditor may issue an execution on the judgment at any time within ten years after its rendition. *Bird v. Kitchens*, 215 Ark. 609, 221 S.W.2d 795, cert. denied, 338 U.S. 892, 70 S. Ct. 241, 94 L. Ed. 548 (1949) (decision prior to 1985 amendment).

A writ of execution or garnishment after a judgment in the circuit or chancery court is issuable only from the court in which the judgment was rendered. *McGehee Bank v. Charles W. Greeson & Sons*, 223 Ark. 18, 263 S.W.2d 901 (1954).

Homestead.

A homestead of a judgment-defendant is not subject to liens except for certain exceptions to the rule. *Davis v. Day*, 56 Ark. 156, 19 S.W. 502 (1892).

A debtor may fix his homestead upon any land he may own regardless of his debts and the rights of his creditors if it is done before any lien attaches to the land. *Sears v. Setser*, 111 Ark. 11, 162 S.W. 1083 (1914).

In a bankruptcy proceeding, where the existence of a lien on a homestead had the detrimental effect of clouding title, thereby preventing a fresh start, the debtors would be allowed to avoid the lien. In re *Kellar*, 204 Bankr. 22 (Bankr. E.D. Ark. 1996).

Husband and Wife.

Where land was deeded to third party by husband merely as conduit in the title

or trustee in conveyance back to husband and wife and the third party was never a bona fide or beneficial owner of the property, judgment against the third party was not a valid lien against the land. *West v. Smith*, 225 Ark. 365, 282 S.W.2d 597 (1955).

Bank could not pay off amount of deed of trust and claim title, since the interest of the wife in the land, where deed of trust signed only by husband, could not be foreclosed, rather, the excess amount must be accounted for to the court according to equity. *Planters Bank & Trust Co. v. Colvin*, 264 Ark. 582, 572 S.W.2d 836 (1978).

Inasmuch as a creditor's judgment against a husband became a lien against his interest in land acquired after the entry of the judgment, when the husband conveyed his interest to his wife, her two estates in the land did not merge to defeat the creditor's intervening equity; she, therefore, received his estate in the land subject to the judgment lien. *Automotive Supply, Inc. v. Powell*, 269 Ark. 255, 599 S.W.2d 735 (1980).

Judgments.

Lien of judgment was not suspended by stay of judgment. *Beloate v. New England Sec. Co.*, 128 Ark. 215, 193 S.W. 795 (1917).

Filing of foreign judgment in office of circuit court of Arkansas county was merely a notice to defendants and prospective grantees that plaintiff had obtained judgment against the defendants and was in the process of enforcing it; however, judgment lien was not acquired by plaintiff against the defendants until default judgment, based on the foreign judgment, was entered by federal court. *Bank of Sun Prairie v. Hovig*, 218 F. Supp. 769 (W.D. Ark. 1963).

A fine assessed the owner of real property constituted a judgment contemplated by this statute and was a lien on the land making the land subject to sale under execution to satisfy the fine. *Hudmon v. Coonfield*, 239 Ark. 1063, 396 S.W.2d 296 (1965).

Justice of Peace.

A judgment of a justice of the peace must be filed with the circuit clerk of that county before it is filed in another county. *Winkler v. Baxter*, 114 Ark. 422, 170 S.W. 94 (1914).

Leases.

A judgment is a lien on a reversion in real estate. A judgment becomes a lien on after-acquired lands. *Trustees R.E. Bank v. Watson & Hubbard*, 13 Ark. (8 English) 74 (1852).

This section does not apply to leaseholds. *Munson v. Wade*, 174 Ark. 880, 298 S.W. 25 (1927).

A lien does not attach to land but only to the interest that the debtor has in land and any diminution in his interest will diminish his lien, or should interest cease entirely, the lien is extinguished. *Snow Bros. Hdw. Co. v. Ellis*, 180 Ark. 238, 21 S.W.2d 162 (1929).

Lessee of recorded oil and gas lease providing that no change of ownership would bind lessee until furnished with written transfer or assignment was not liable for royalty payments made to judgment debtor prior to time he was notified of judgment. *Standard Oil Co. v. Craig*, 202 Ark. 168, 150 S.W.2d 744 (1941).

Neither the probate court order granting a lien upon the real estate nor the order reviving the lien were construed to do more than recognize that the judgment constituted a lien on the real estate of the owner. *Price v. Price*, 253 Ark. 1124, 491 S.W.2d 793 (1973).

—Priority.

A judgment lien on land has priority over a mortgage of later date. *Trapnall v. Richardson, Waterman & Co.*, 13 Ark. (8 English) 543 (1853).

Where a lien antedates a recorded mortgage, the lien is superior to that of a subsequently dated mortgage. *Pindall v. Trevor & Colgate*, 30 Ark. 249 (1875); *Hawkins v. Files*, 51 Ark. 417, 11 S.W. 681 (1888).

A lien of a judgment is subject to all valid liens on the property, whether recorded or not. *Apperson & Co. v. Burgett*, 33 Ark. 328 (1878).

A creditor who first obtains a judgment against his debtor acquires a superior lien on his lands against another creditor who procured a general attachment. *Goodard-Peck Grocery Co. v. Adler-Goldman Comm'n Co.*, 67 Ark. 359, 55 S.W. 136 (1900).

Where judgment creditors caused writs of execution to issue to give their lien priority over mortgage, the court held that liens were junior and inferior to mortgage.

First Nat'l Bank v. Meriwether Sand & Gravel Co., 188 Ark. 642, 67 S.W.2d 599 (1934).

Prior recorded mortgage has priority over a judgment recorded subsequently, even though mortgagee knew that there was an unrecorded judgment against the mortgagor. *Fears v. Futrell*, 216 Ark. 122, 224 S.W.2d 362 (1949).

Where plaintiff loans money to a judgment debtor, and takes a mortgage as security, which mortgage is recorded, and thereafter the plaintiff loans the judgment debtor an additional amount, and note states that it is secured by the same property covered by the prior recorded mortgage, and thereafter the judgment is recorded, the note is an equitable mortgage, and takes priority over the recorded judgment. *Fears v. Futrell*, 216 Ark. 122, 224 S.W.2d 362 (1949).

Certificate of assessment for unpaid unemployment compensation taxes acquired status of judgment when filed in circuit court in accordance with § 11-10-718 and constituted a lien of debtor's realty which was superior to federal government's lien for taxes under F. C. A., tit. 26, § 3670 where state's lien was first in point of time and there was no allegation of insolvency to bring into play the federal priority statute (F. C. A., tit. 31, § 191). *Commercial Credit Corp. v. Schwartz*, 130 F. Supp. 524 (E.D. Ark. 1955).

A first mortgage lost its priority over a junior lien when the holder of the first mortgage chose not to foreclose, but instead chose to take a "warranty deed in lieu of foreclosure," and then resold a substantial part of the same real estate to a stranger to the title without taking any action against the holder of the junior lien, resulting in a merger extinguishing the first mortgage debt, and leaving the intervening lien outstanding. *Construction Mach. v. Roberts*, 307 Ark. 252, 819 S.W.2d 268 (1991).

Partnership.

The interest which a partner holds in a partnership is directly proportioned to the amount he is subject to in a judgment lien on the partnership. *Jones, McDowell & Co. v. Fletcher*, 42 Ark. 422 (1883).

Recordation of Deed.

A judgment rendered was not prior and paramount to a deed recorded on the same

date but executed previously when there was no conspiracy to defraud, and the bona fide purchaser paid a fair price for the land. *Tolley v. Wilson*, 212 Ark. 163, 205 S.W.2d 177 (1947).

Revival of Judgment.

A scire facias writ was properly issued by the trial court for the revival of a judgment where the ten-year limitation period on the effectiveness of the judgment had not yet run, even though the original judgment lien of 3 years had expired. *Burton v. Bank of Tuckerman*, 276 Ark. 538, 637 S.W.2d 577 (1982) (decision under prior law).

Tax Sale.

A judgment recovered after judgment-debtor has permitted lands to be sold for taxes and before period allowed by law for redemption from the tax sale has expired is a lien on the interest therein. *McNeill v. Carter*, 57 Ark. 579, 22 S.W. 94 (1893).

One who purchases the land from the debtor subsequent to the rendition of the judgment takes subject to those liens and does not acquire any new title or right to priority over the judgment lien by redemption from the tax sale. *McNeill v. Carter*, 57 Ark. 579, 22 S.W. 94 (1893).

Time Limit.

The time limit provided in this section is not a statute of limitation; it is a period of duration. The expiration of a statute of limitation extinguishes a right to enforce a remedy, but it does not extinguish the substantive right itself; the expiration of the statute of duration, however, extinguishes the substantive right itself. *Refco, Inc. v. Heinhold Commodities, Inc.*, 295 Ark. 32, 746 S.W.2d 375 (1988).

—Revival.

Under this section, a lien expires unless it is revived under § 16-65-501. Lien expired pursuant to this section where the judgment creditor did not comply with § 16-65-501, and the mere fact that it was made a party to a lawsuit during the existence of the lien did not in itself prevent the subsequent expiration of the lien. *Refco, Inc. v. Heinhold Commodities, Inc.*, 295 Ark. 32, 746 S.W.2d 375 (1988).

Cited: *Ford v. Harrison*, 69 Ark. 205, 62 S.W. 59 (1901); *Pepin v. Hoover*, 205 Ark. 251, 168 S.W.2d 390 (1943); *Warren v. Warren*, 273 Ark. 528, 623 S.W.2d 813

(1981); *Speer v. Speer*, 298 Ark. 294, 766 S.W.2d 927 (1989); *In re Inmon*, 208 Bankr. 455 (Bankr. E.D. Ark. 1996); *In re Bookout*, 231 Bankr. 306 (E.D. Ark. 1999); *Smith v. Credit Serv. Co.*, 339 Ark. 41, 2 S.W.3d 69 (1999).

16-65-118. Liens of officers and attorneys.

(a) When any judgment is recovered in a court of record by or in favor of any party, all officers who in pursuance of law and attorneys who upon contract expressed or implied have rendered service for or in behalf of the party in the action or proceedings in or upon which the judgment was rendered, shall severally have liens upon and an interest in the judgment, as follows:

(1) Each officer to the amount to which he or she is entitled by law as costs, fees, allowances, or otherwise for services rendered to or on behalf of the party; and

(2) Each attorney to the amount to which he or she is entitled by contract or, if no amount is fixed, a reasonable compensation for his or her services rendered as set forth above for or on behalf of the party.

(b)(1) Any property sold upon, in pursuance of, or to satisfy the judgment and purchased, directly or indirectly, by or on behalf of the party in whose favor the judgment was rendered, his or her heir, personal representative, or assignee, shall be deemed to be held in trust for any person holding a lien to the amount of his or her lien until the lien is discharged.

(2) When the judgment is for the recovery of real or personal property, the lien shall amount to an interest in the property to the extent of the lien.

History. Civil Code, § 426; C. & M. Dig., §§ 6304-6306; Pope's Dig., §§ 8260-8262; A.S.A. 1947, § 29-132.

Cross References. Lien of attorney, § 16-22-304.

CASE NOTES

ANALYSIS

Applicability.
Attorney's liens.
Equitable or charging lien.
Judgment for state.
Justices of the peace.
Real property liens.
Set-off.
Settlement.

Applicability.

This section applies to professional services which have produced a judgment or something tangible and does not apply to services which protect an existing title or right to property. *Greer v. Ferguson*, 56 Ark. 324, 19 S.W. 966 (1892).

Attorney's Liens.

Where an attorney has recovered a

judgment for his client and taken steps to perfect his lien for his services, he acquires an interest in the judgment of which he cannot be deprived after the judgment has become final. *Osborne v. Waters*, 92 Ark. 388, 123 S.W. 374 (1909).

At common law an attorney has a lien upon his client's evidence of indebtedness in his hands but not upon the debt itself and hence a complaint in equity seeking to fix a lien on the proceeds of the client's insurance policy did not state any facts which would confer a lien where it did not allege that the policy or other evidence, if any, was in the possession of the attorney. *Cosby v. Hurst*, 149 Ark. 11, 231 S.W. 194 (1921).

Attorneys employed to conduct a lawsuit had a lien on the judgment or funds

recovered for their services. *Lake v. Wilson*, 183 Ark. 180, 35 S.W.2d 597 (1931).

Where decedent's mother was held to be sole beneficiary of his estate subject to dower right and statutory allowances of decedent's widow, it was sufficient to establish an attorney's lien on the mother's recovery pursuant to a contingent fee agreement. *Camp v. Park*, 226 Ark. 1026, 295 S.W.2d 613 (1956).

While a client may dispose of his cause of action as he sees fit, if there are any proceeds from the litigation derived by settlement or final judgment the attorney has a lien thereon of which he cannot be deprived by the parties. *Camp v. Park*, 226 Ark. 1026, 295 S.W.2d 613 (1956).

When an attorney recovers judgment for his client of the nature prescribed by statute and takes steps to perfect his lien he acquires an interest in the judgment of which he cannot be deprived after the judgment becomes final. *Camp v. Park*, 226 Ark. 1026, 295 S.W.2d 613 (1956).

Equitable or Charging Lien.

Requisites for an equitable or charging lien of an attorney are an agreement the intent of which is to give or charge or pledge property as security for an obligation and sufficient description of the property to be given or charged. *Camp v. Park*, 226 Ark. 1026, 295 S.W.2d 613 (1956).

Where an agreement contains no express provision for a lien to secure a debt thereunder it must appear that the contracting party asserting the lien looked to the fund itself for payment and did not rely on the personal responsibility of the owner of the claim of which the fund was the result. *Camp v. Park*, 226 Ark. 1026, 295 S.W.2d 613 (1956).

Judgment for State.

An attorney has no lien on a judgment recovered in favor of the state. *Compton v. State*, 38 Ark. 601 (1882).

Justices of the Peace.

Justices of the peace have jurisdiction to

enforce attorney's lien. *Adamson v. Kay*, 100 Ark. 248, 140 S.W. 13 (1911).

Real Property Liens.

If a judgment is for recovery of property, the attorney's lien gives him an interest in it which court of equity will enforce. *Porter, Taylor & Co. v. Hanson*, 36 Ark. 591 (1880); *Lane v. Hallum*, 38 Ark. 385 (1882).

Where an attorney's services lifted a cloud on title, he has no lien on property for those services. *Hershy v. Du Val*, 47 Ark. 86, 14 S.W. 469 (1885).

Where, under a decision of the trial court, a client's land was taken possession of by his adversary, but upon appeal the decision was reversed whereupon the possession was surrendered to the client, this constituted a recovery which entitled the attorney to a lien on the land. *Greenlee v. Rowland*, 85 Ark. 101, 107 S.W. 193 (1908).

While an attorney has no lien for services for merely defending a suit, services rendered in canceling a conveyance for fraud and recovering the land are such services as to entitle the attorney to a lien. *Baxter County Bank v. Davis*, 137 Ark. 459, 208 S.W. 797 (1919).

Set-Off.

Where one, holding judgment against another, moves to have it set off against a judgment against himself in the other's favor, his right thereto will not be defeated by a lien of the other's attorney subsequently filed on the latter judgment. *Park v. Hutchinson*, 80 Ark. 183, 96 S.W. 751 (1906).

Settlement.

Where an attorney in a suit causes property to be attached, the lien of the attachment inures to his benefit, and cannot be defeated by any settlement between the parties. *Gist v. Hanly*, 33 Ark. 233 (1878). See also *Hall v. Huff*, 114 Ark. 206, 169 S.W. 792 (1914); *Saint Louis, I.M. & S. Ry. v. Blaylock*, 117 Ark. 504, 175 S.W. 1170 (1915).

16-65-119. [Repealed.]

Publisher's Notes. This section, concerning reversal, modification, or vacation of judgments, was repealed by Acts 2003, No. 1185, § 195. The section was derived

from Civil Code, §§ 566-568; C. & M. Dig., §§ 6285-6287; Pope's Dig., §§ 8241-8243; A.S.A. 1947, § 29-501 — 29-503.

16-65-120. Sale or transfer of judgment or cause of action — Filing and noting by clerk.

(a) The sale of a judgment or any part thereof of any court of record within this state or the sale of any cause of action or interest therein after suit has been filed thereon, shall be evidenced by a written transfer which, when acknowledged in the manner and form required by law for the acknowledgment of deeds, may be filed with the papers of the suit. When thus filed by the clerk, it shall be his or her duty to make a minute of the transfer on the margin of the record of the court where the judgment of the court is recorded or, if judgment is not rendered when the transfer is filed, the clerk shall make a minute of the transfer on the docket of the court where suit is entered, giving briefly the substance thereof, for which services he or she shall be entitled to a fee of twenty-five cents (25¢), to be paid by the party applying therefor.

(b) When the transfer is duly acknowledged, filed, and noted as provided in subsection (a) of this section, the transfer shall be full notice and valid and binding upon all persons subsequently dealing with reference to the cause of action or judgment, whether they have actual knowledge of the transfer or not.

(c) This section shall apply to any and all judgments, suits, claims, and causes of action, whether assignable or not.

History. Acts 1899, No. 92, § 1, p. 154; C. & M. Dig., § 6303; Pope's Dig., § 8259; A.S.A. 1947, § 29-123; Acts 2003, No. 1185, § 196.

Amendments. The 2003 amendment deleted "in law and equity" following "whether assignable" in (c).

RESEARCH REFERENCES

Ark. L. Rev. Note, Altered or Absent Evidence: The Tort of Spoliation: *Wilson v. Beloit Corp.*, 43 Ark. L. Rev. 453.

CASE NOTES**ANALYSIS**

Acknowledgment and recording.
Claims against counties.
Filing of assignment.
Notice.
Other legislation.

Acknowledgment and Recording.

Even though bank failed to have assignment to it acknowledged and recorded as provided in this section, bank's security interest was protected against the subsequent lien of the Internal Revenue Service. *Brown & Root, Inc. v. Hempstead County Sand & Gravel, Inc.*, 588 F. Supp.

1266 (E.D. Ark. 1984), *aff'd*, 767 F.2d 464 (8th Cir. 1985).

Claims Against Counties.

Sale of claim against county does not come under this section. *Shelton v. Landers*, 167 Ark. 638, 270 S.W. 522 (1925).

Although the assignment of a suit pending against a county did not comply with this section, it was nevertheless valid between the parties and a subsequent garnisher takes subject to the assignment. *McKim v. Highway Iron Prods. Co.*, 181 Ark. 1121, 29 S.W.2d 682 (1930).

Filing of Assignment.

The assignment should be filed in the

lower court. *Saint Louis, I.M. & S. Ry. v. Hambright*, 87 Ark. 242, 112 S.W. 876 (1908).

Notice.

Actual notice of assignment is binding, though transfer is not filed. *Kansas City, F.S. & M.R.R. v. Joslin*, 74 Ark. 551, 86 S.W. 435 (1905).

Other Legislation.

This section, which relates specifically to the sale and assignment of judgments

and causes of action, was not impliedly repealed by enactment of § 4-9-102, and was the applicable law; therefore, a cause of action assigned to bank as collateral for loan prior to filing of federal tax liens by federal government against assignor took precedence over tax liens that arose out of unsecured obligation. *Brown & Root, Inc. v. Hempstead County Sand & Gravel, Inc.*, 767 F.2d 464 (8th Cir. 1985).

Cited: *Elardo v. Taylor*, 291 Ark. 503, 726 S.W.2d 1 (1987).

16-65-121. Judgments, etc., effective from date rendered.

All judgments, orders, and decrees rendered in open court by any court of record in the State of Arkansas are effective as to all parties of record from the date rendered and not from the date of entry of record.

History. Acts 1989 (3rd Ex. Sess.), No. 98, § 1.

RESEARCH REFERENCES

UALR L.J. Survey, Civil Procedure, 12
UALR L.J. 603.

CASE NOTES

ANALYSIS

In general.
Construction.
Applicability.
Open court.

In General.

A letter from the judge, or an announcement in open court, until reduced to an order and properly entered by the clerk, does not create or terminate legal or equitable rights that exist under the law. In re *Bunt*, 165 Bankr. 894 (Bankr. E.D. Ark. 1994).

Ark. R. Civ. P. Rule 58, rather than this section, controlled the effective date of a divorce decree, and the rule effectively supercedes the statute. *Price v. Price*, 341 Ark. 311, 16 S.W.3d 248 (2000).

Construction.

The parties need not take actions to preserve appeal rights or other procedures permitted under the rules of procedure from the date of a ruling in open court; to construe this section in this manner would create not only a direct conflict with ARCP 58, but also procedural chaos. In re

Bunt, 165 Bankr. 894 (Bankr. E.D. Ark. 1994).

Even where a decision has been rendered in open court, this section would not alter the legal fact that a final judgment had not been "entered." In re *Bunt*, 165 Bankr. 894 (Bankr. E.D. Ark. 1994).

"Entry" of a document is distinct from "dated" or "filed": the term "dated" refers to the date the judge signs the order; a document is "filed" on the date the clerk file-stamps it; and a document is "entered" when it is actually recorded on the docket sheet or book by the clerk. In re *Bunt*, 165 Bankr. 894 (Bankr. E.D. Ark. 1994).

The language "effective as to all parties of record" implies, at least, a directive that the parties to the action must act in accord with the directives issued to them, in open court, by the presiding judge, and the parties are clearly on notice of the directives, just as if the order had been "entered" by the clerk; thus, it is logical that the individuals or entity parties, having been told the decision by the decision-maker, be required to behave, outside the courtroom, in a manner consistent with

that ruling. *In re Bunt*, 165 Bankr. 894 (Bankr. E.D. Ark. 1994).

The ambiguous term “rendered” provides fruitful argument to litigants who wish to avoid the effect, whatever it may be, of this section. *In re Bunt*, 165 Bankr. 894 (Bankr. E.D. Ark. 1994).

With respect to judgment and commitment orders, they are effective upon entry of record in accordance with Ark. Sup. Ct. Admin. Order No. 2, and as this section directly conflicts with the rules of the Supreme Court of Arkansas, Ark. Sup. Ct. Admin. Order No. 2, and Arkansas case-law, it is superseded; thus, a trial court was well within its authority to modify a sentence pronounced in open court prior to entry of judgment as long as it complied with other pertinent criminal rules. *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003).

Trial court had the authority to modify a sentence pronounced in open court prior to the entry of judgment because the oral order was not effective until set forth in writing and filed of record; although defendant claimed a denial of the right to be

present at all proceedings pursuant to § 5-4-310, defendant was present for all portions of the proceedings, and while this section had provided that a judgment rendered in open court was effective from that date, this section has been superseded. *Hankins v. State*, 84 Ark. App. 370, 141 S.W.3d 905 (2004).

Applicability.

The application of this section is limited, as its language suggests; it does not affect, legally or equitably, any persons other than the parties to the litigation. *In re Bunt*, 165 Bankr. 894 (Bankr. E.D. Ark. 1994).

Open Court.

The term “open court” refers to the proceedings and acts taken by parties and the court in the courtroom and on the record. *In re Bunt*, 165 Bankr. 894 (Bankr. E.D. Ark. 1994).

A letter signed by the judge on his letterhead, delivered to the parties through the United States mail does not constitute “open court.” *In re Bunt*, 165 Bankr. 894 (Bankr. E.D. Ark. 1994).

16-65-122. Records to contain judgment debtors’ social security number — Exceptions.

The records of all personal judgments rendered in circuit court shall contain the social security number of the judgment debtor unless otherwise prohibited under federal law or the social security number is unavailable.

History. Acts 1993, No. 267, § 1.

A.C.R.C. Notes. Acts 1993, No. 267, § 1, as originally enacted, amended § 16-20-304.

Cross References. Record and index of court proceedings, § 16-20-304.

SUBCHAPTER 2 — JUDGMENT ON MOTION

SECTION.

16-65-201. [Repealed.]

16-65-202. Judgments against officers or securities on defaults.

Effective Dates. Acts 1941, No. 388, § 3: approved Mar. 26, 1941. Emergency clause provided: “There being no present adequate procedural remedy for appellees against appellants and their sureties in

cases wherein supersedeas or appeal bonds are given but the appeals are not perfected, it is hereby declared that an emergency exists and that, this act being necessary for the preservation of the pub-

lic peace, health and safety, shall be in full force and effect from and after its passage."

RESEARCH REFERENCES

C.J.S. 49 C.J.S., Judgm., § 243 et seq.

CASE NOTES

Federal Rules.

This subchapter is an adoption of Rule 56 of the Federal Rules of Civil Procedure.

Ashley v. Eisele, 247 Ark. 281, 445 S.W.2d 76 (1969).

16-65-201. [Repealed.]

Publisher's Notes. This section, concerning obtaining judgments on motion, was repealed by Acts 2003, No. 1185, § 197. The section was derived from Civil

Code, §§ 478-483; C. & M. Dig., §§ 6250-6254; Pope's Dig., §§ 8206-8210; Acts 1941, No. 388, § 1; 1961, No. 30, § 1; A.S.A. 1947, §§ 29-201—29-206.

16-65-202. Judgments against officers or securities on defaults.

(a)(1) Judgment shall be rendered summarily against the persons and their securities and for the defaults stated in subsections (b)-(d) of this section.

(2) The motion may be made by the party aggrieved or his or her legal representatives against the person in default and his or her securities upon his or her official bond.

(3) Judgment shall be rendered against such of the parties, whether principal or surety, as may have received notice of the intended motion.

(b) Judgments shall be rendered for the plaintiffs in the following cases against the sheriff, coroner, or constable receiving or executing the writ:

(1) For willfully failing to return an execution, the amount of the judgment on which it was issued, including all the costs and ten percent (10%) thereon;

(2) On demand of the plaintiff or his or her agent or attorney for willfully failing to pay over money collected upon an execution, judgment for the amount so collected, and ten percent (10%) per month damages from the time such demand was made;

(3)(A) Judgment for the amount of the execution, interest, costs, and ten percent (10%) damages for willfully failing to make the money on an execution which by due diligence could have been made.

(B) However, the sheriff or other officer shall have the same defenses that now exist by law with regard to property, the title to which is contested;

(4) For willfully making a false return upon an execution, judgment for the amount of the execution, interest, and costs, and ten percent (10%) damages thereon;

(5) For willfully failing to endorse on an execution the true date of its delivery to him or her, judgment for twenty percent (20%) on the amount of the execution, and the officer shall also be responsible for any injury or loss which may arise from the omission;

(6)(A) For willfully failing to execute a summons, attachment, or other mesne process which, by due diligence, could have been executed, judgment for a sum not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500) to be ascertained by a jury.

(B) This remedy shall not preclude the party injured from a resort to other legal means of redress; and

(7) Judgment in favor of the party or officer, as the case may be, for the amount for which he or she is liable, and ten percent (10%) per month thereon from the time the money should have been paid, until paid, for willfully failing to pay on demand to the party or officer entitled to receive the same all money received by him or her in his or her official capacity, and which it is by law his or her duty to pay over, whether it is for fines, forfeitures, costs, or other indebtedness.

(c) In the manner prescribed in subsection (a) of this section, judgment shall be rendered in favor of the defendant against the officers and their securities named in that subsection on the notice therein specified:

(1) For willfully failing to pay over on demand any excess of money which may remain upon a sale by execution, after the satisfaction thereof, and the costs, judgment for the amount of such excess and five percent (5%) per month after demand;

(2) For willfully failing to return an execution, wholly or partially satisfied, twenty-five percent (25%) on the amount paid; and

(3) For willfully failing to pay over on demand money paid or collected on an execution, the whole or any part of which is enjoined in circuit court or the judgment on which the execution issued has been reversed or set aside in any manner or the execution superseded or quashed, judgment for the amount and five percent (5%) per month on the amount from the time the execution was returnable.

(d) Judgment shall be rendered against the clerk and his or her sureties, in the manner prescribed in subsection (a) of this section, upon the notice prescribed and shall be rendered in favor of the plaintiff:

(1) Twenty-five percent (25%) on the amount of the debt for willfully failing to issue an execution upon a forfeited delivery bond within five (5) days after the return thereof to his or her office by the proper officer;

(2) Twenty-five percent (25%) on the amount of the judgment for willfully failing to issue execution upon any judgment, order, or decree in his or her office on request of the party interested, or his or her agent or attorney; and

(3)(A) Judgment for a sum not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500), to be ascertained by a jury, for willfully failing to issue an attachment, summons, or other mesne process, which the party applying may be entitled to have issued.

(B) This remedy is not to preclude the party injured from a resort to other legal means of redress.

History. Acts 1857, §§ 1-3, p. 141; C. & M. Dig., §§ 6255-6258; Pope's Dig., §§ 8211-8214; A.S.A. 1947, §§ 29-207 — 29-210; Acts 2003, No. 1151, § 1.

Amendments. The 2003 amendment,

throughout this section, inserted “willfully” preceding “failing” and made stylistic and gender neutral changes.

Cross References. Return of execution, § 16-66-416.

CASE NOTES

ANALYSIS

Constables.

Sheriffs.

—Failure to return.

Constables.

It is no defense to an action against a constable for failure to return an execution that the execution was prematurely issued within ten days after the rendition of the judgment, or that it commanded the sheriff to collect interest on the judgment at an incorrect rate. *Jones v. Goodbar*, 60 Ark. 182, 29 S.W. 462 (1895).

Where a constable has neglected to levy an attachment whereby plaintiff suffers damage, the plaintiff must elect whether he will sue the constable on his common-law liability or under this section. *Abbott v. Norman*, 134 Ark. 535, 204 S.W. 303 (1918).

Sheriffs.

Where sheriff has paid over money collected on judgment to “attorney of record” as permitted by § 21-6-307, he cannot be held liable under subdivision (b)(2) for failure to pay money over to plaintiff. *Williams v. State*, 65 Ark. 159, 46 S.W. 186 (1898).

Where a sheriff seized property by virtue of legal process in a replevin case, he became privy to the suit and can exempt himself from liability for subsequent loss of the property only by showing that he made disposition of it as the law directs or that its loss was not on account of his negligence and he cannot question the right and title of the plaintiff who recovered in that action. *Hearn v. Ayres*, 77 Ark. 497, 92 S.W. 768 (1906).

Subsection (b) is mandatory and fact that during the time sheriff held the execution the judgment was set aside as to some of the debtors did not excuse him from making the return within the proper time nor exempt him from liability therefor. *J.B. Pearson Flour & Feed Co. v. Pittman*, 192 Ark. 1062, 95 S.W.2d 1143 (1936).

Where a judgment was entered in the circuit court of one county and an execution upon that judgment was issued to the sheriff of another county, a motion for summary judgment against the sheriff for failure to levy the execution was properly filed against the sheriff in the county in which the judgment was obtained. *Atkinson v. Means*, 252 Ark. 8, 477 S.W.2d 178 (1972).

A sheriff sued by a plaintiff in execution under this section can defend against a failure of duty by showing that his omission in performing the duty was due to the conduct or instructions of the judgment plaintiff or his attorney of record; accordingly, where the record showed that the judgment plaintiffs and their attorney had substantially contributed to any omission by the sheriff by causing the power of the execution to be exhausted by accepting payments on the judgment, they were not entitled to recover against him. *555, Inc. v. Barlow*, 3 Ark. App. 139, 623 S.W.2d 843 (1981).

—Failure to Return.

If a sheriff fails to return an execution, which he has accepted without a demand for his fees, on or before the return day, he is liable to the plaintiff for the amount of the judgment, with costs and ten per cent thereon, and the plaintiff is entitled to summary judgment therefor. *Heer & Co. v. Atkinson*, 40 Ark. 377 (1883). But see *Atkinson v. Hulse*, 30 Ark. 760 (1875).

It is no defense to an officer in a failure to return action that the defendant is insolvent; nor that he was prevented from filing it by reason of the absence of the clerk, without further showing that the office remained closed during the life of the execution and he returned it as soon thereafter as possible. *Atkinson v. Heer & Co.*, 44 Ark. 174 (1884).

It does not excuse the sheriff that there may be irregularities in the execution in an action for failure to return. *Hawkins v. Taylor*, 56 Ark. 45, 19 S.W. 105 (1892).

Where an execution was returned by

the sheriff after the return day and subsequently the judgment on which it was issued was satisfied, the execution plaintiff cannot maintain an action against the sheriff for failure to return the execution within the prescribed time, as the acceptance of payment waived any cause of action growing out of the failure. *Powell v. Massey-Herndon Shoe Co.*, 69 Ark. 79, 62 S.W. 66 (1901).

Where the execution was directed to the sheriff of a county other than the one where issued and failed to show from what court it was issued and the sheriff returned it to the court in his own county, it was error for the court to refuse to instruct the jury that, if the failure to make the return to the proper clerk was due to a mistake of existing facts on the part of the sheriff as to which clerk issued the execution and that mistake was not the result of the sheriff's own carelessness or negligence, they should find for the sheriff. *Hamilton v. Pan Am. S. Corp.*, 238 Ark. 38, 378 S.W.2d 652 (1964).

Where a judgment was entered in the circuit court of one county and an execution upon that judgment was issued to the sheriff of another county, a motion for summary judgment against the sheriff for failure to levy the execution was properly filed against the sheriff in the county in

which the judgment was obtained. *Atkinson v. Means*, 252 Ark. 8, 477 S.W.2d 178 (1972).

Sheriff's failure to return execution within the required time may be excusable, in action against him by judgment creditor, where failure was due at least in part to judgment creditor. *Southern Credit Corp. v. Atkinson*, 255 Ark. 615, 502 S.W.2d 497 (1973).

The automatic stay provision of the U.S. bankruptcy code does not relieve the sheriff of the statutory duty to file a return within 60 days. *Lindsey Family Trust v. Cauthron*, 20 Ark. App. 149, 725 S.W.2d 581 (1987).

Summary judgment granted for sheriff where the judgment creditor's attorney mailed the original writ to the sheriff and he mailed it back to the attorney asking attorney to make a specific listing of property, but the plaintiff's attorney never advised the sheriff of any specific property and kept the writ past the deadline for filing with the clerk; a judgment creditor cannot benefit from any direct or indirect act that contributes to the officer's omission to perform his duty. *Vinson Elec. Supply, Inc. v. Poteete*, 321 Ark. 516, 905 S.W.2d 831 (1995).

Cited: *Sutter v. King*, 310 Ark. 681, 839 S.W.2d 218 (1992).

SUBCHAPTER 3 — JUDGMENT BY CONFESSION

SECTION.

16-65-301. Appearance and confession.

16-65-302. Requisites of judgment.

SECTION.

16-65-303. Enforcement.

16-65-304. Release of errors.

Cross References. Justice of the peace courts, confession of judgment, § 16-19-706.

RESEARCH REFERENCES

Am. Jur. 46 Am. Jur. 2d, Judgm., § 228 et seq.

Ark. L. Rev. Joyce, Due Process and the Cognovit Clause, 33 Ark. L. Rev. 745.

C.J.S. 49 C.J.S., Judgm., § 138 et seq.

16-65-301. Appearance and confession.

Any person indebted or against whom a cause of action exists may personally appear in a court of competent jurisdiction, and with assent

of the creditor or person having the cause of action, confess judgment therefor; whereupon, judgment shall be entered accordingly.

History. Civil Code, § 413; C. & M. Dig., § 6245; Pope's Dig., § 8201; A.S.A. 1947, § 29-301.

CASE NOTES

ANALYSIS

Appearance.

Confession by attorneys.

Appearance.

This section, requiring personal appearance in court, covers all modes of taking judgment by confession, and former practice of taking the judgment before clerk in vacation is improper. *Hare v. Hall*, 41 Ark. 372 (1883).

Where the entry of a judgment by confession in the docket of a justice of the peace does not show except by inference that the defendant personally appeared in the justice court as provided by law, and it is shown by parol testimony that he did not in fact appear, the judgment will be

held void. *Smith v. Finley*, 52 Ark. 373, 12 S.W. 782 (1889).

A judgment by confession in vacation is void. *Blass v. Lee*, 55 Ark. 329, 18 S.W. 186 (1892).

Confession by Attorneys.

Where defendants each signed an instrument acknowledging indebtedness to plaintiff, authorizing a certain attorney to enter appearances, and consenting to the rendering of a judgment against them, judgment reciting "defendants each confess judgment herein by their written agreements duly filed herein" shows a judgment by consent and is valid upon collateral attack. *Haupt v. Bohl*, 71 Ark. 330, 75 S.W. 470 (1903).

16-65-302. Requisites of judgment.

The debt or cause of action shall be briefly stated in the judgment by confession or in a writing to be filed as pleadings in other actions.

History. Civil Code, § 414; C. & M. Dig., § 6246; Pope's Dig., § 8202; A.S.A. 1947, § 29-302.

16-65-303. Enforcement.

A judgment by confession shall authorize the same proceedings for its enforcement as judgments rendered in actions regularly brought and prosecuted.

History. Civil Code, § 415; C. & M. Dig., § 6247; Pope's Dig., § 8203; A.S.A. 1947, § 29-303.

16-65-304. Release of errors.

The confession shall operate as a release of errors.

History. Civil Code, § 415; C. & M. Dig., § 6247; Pope's Dig., § 8203; A.S.A. 1947, § 29-303.

CASE NOTES

ANALYSIS

Estoppel.
Multiple parties.

Estoppel.

A party confessing judgment before a justice of the peace is estopped by his voluntary act from questioning its correctness and cannot appeal therefrom. *Cave v. T.J. Smith & Son*, 101 Ark. 348, 142 S.W. 508 (1912).

Multiple Parties.

After insurer's confession of judgment,

it was dismissed from case in regard to its claim against insured, but the confessed judgment did not dismiss insurer from its rights of subrogation against the third-party tort-feasor; while insurer was estopped from denying the correctness of the confessed judgment, the judgment clearly did not preclude it from pursuing other claims to which it was entitled and to which no confession of judgment had been made in an action involving multiple parties. *Farm Bureau Mut. Ins. Co. v. Riverside Marine Remanufacturing, Inc.*, 278 Ark. 585, 647 S.W.2d 462 (1983).

SUBCHAPTER 4 — DEFAULT JUDGMENT

SECTION.

16-65-401. [Superseded.]

16-65-402, 16-65-403. [Repealed.]

Cross References. Allowed by justice of the peaces, §§ 16-19-702 — 16-19-704.

Effective Dates. Acts 1923, No. 661,

§ 2: effective on passage. Emergency declared. Approved Mar. 23, 1923.

RESEARCH REFERENCES

Am. Jur. 46 Am. Jur. 2d, Judgm., § 265 et seq.

Ark. L. Rev. Note, Setting Aside De-

fault Judgments in Arkansas, 45 Ark. L. Rev. 971.

C.J.S. 49 C.J.S., Judgm., § 195 et seq.

16-65-401. [Superseded.]

A.C.R.C. Notes. The Supreme Court of Arkansas stated in a Per Curiam of Nov. 24, 1986, that this section, concerning default by failure to file a defense, was

deemed superseded by the Arkansas Rules of Civil Procedure. The section was derived from Acts 1955, No. 351, § 3; 1971, No. 174, § 1; A.S.A. 1947, § 29-410.

16-65-402, 16-65-403. [Repealed.]

Publisher's Notes. These sections, concerning default judgments as to uncontroverted claims and in cases of constructive service, were repealed by Acts 1993, No. 1275, § 1. The sections were derived from the following sources:

16-65-402. Civil Code, § 412; C. & M. Dig., § 6249; Pope's Dig., § 8205; A.S.A. 1947, § 29-403.

16-65-403. Civil Code, §§ 445-449; Acts 1891, No. 54, § 1, p. 91; C. & M. Dig., §§ 6261-6265; Acts 1923, No. 661, § 1; Pope's Dig., §§ 8217-8221; A.S.A. 1947, §§ 29-404 — 29-408. For present law, see ARCP 55.

SUBCHAPTER 5 — SURVIVAL AND REVIVAL

SECTION.

- 16-65-501. Scire facias.
- 16-65-502. Survival or revival of judgment upon death of a party.
- 16-65-503. Revival against administrators in succession.
- 16-65-504. Revival of judgment against

SECTION.

- personal representatives, heirs, and devisees of deceased defendant.
- 16-65-505. Executions issued against defendant and deceased defendants' representatives.

Effective Dates. Acts 1891, No. 110, § 2: effective one year from date of passage.

RESEARCH REFERENCES

Am. Jur. 46 Am. Jur. 2d, Judgm., § 415 et seq.
C.J.S. 50 C.J.S., Judgm., § 636 et seq.

UALR L.J. Legislative Survey, Property, 8 UALR L.J. 599.

16-65-501. Scire facias.

(a) The plaintiff or his or her legal representatives may, at any time before the expiration of the lien on any judgment, sue out a scire facias to revive the judgment.

(b) The scire facias shall be served on the defendant or his or her legal representatives, terre-tenants, or other person occupying the land, and may be directed to and served in any county in this state.

(c)(1) If the defendant cannot be found, the court shall make an order briefly setting forth the nature of the case and requiring all persons interested to appear on a date set by the court and show cause why the judgment or decree should not be revived and lien continued.

(2) A copy of the order shall be put up for four (4) weeks at the courthouse door of the county in which the judgment or decree may have been rendered.

(d) If upon service or publication of the scire facias, as required in subsection (c) of this section, the defendant or any other person interested does not appear and show cause why such judgment or decree shall not be revived, the judgment shall be revived and the lien continued for another period of ten (10) years and so on from time to time as often as may be necessary.

(e) If a scire facias is sued out before the termination of the lien of any judgment or decree, the lien of the judgment revived shall have relation to the day on which the scire facias issued. However, if the lien of any judgment or decree has expired before suing out the scire facias, the judgment of revival shall be only a lien from the time of the rendition of the judgment.

(f) No scire facias to revive a judgment shall be issued except within ten (10) years from the date of the rendition of the judgment, or if the judgment shall have been previously revived, then within ten (10) years from the order of revivor.

History. Rev. Stat., ch. 84, §§ 6-11; Acts 1891, No. 110, § 1, p. 192; C. & M. Dig., §§ 6316-6322; Pope's Dig., §§ 8271-8277; Acts 1983, No. 718, §§ 1, 2; 1985, No. 228, § 2; A.S.A. 1947, §§ 29-601—29-607.

Publisher's Notes. Acts 1985, No. 228,

§ 3, provided that the provisions of the act would be applicable only to the liens of judgments rendered or revived on or after June 28, 1985.

Cross References. Alimony or support payments, lien, §§ 9-14-230, 9-14-231.

CASE NOTES

ANALYSIS

In general.

Purpose.

Heirs.

Original judgment.

Probate court.

Res judicata.

Revival.

Second judgment.

Service of process.

Several defendants.

Timeliness.

In General.

Scire facias is in the nature of a writ of summons. *Alexander v. Steel*, 13 Ark. (8 English) 392 (1853).

The writ of scire facias occupies the place of both declaration and writ of summons. *Trapnall & Trapnall v. Terry & Steele*, 27 Ark. 70 (1871).

A scire facias is both a complaint and summons, and should run in the name of all of the plaintiffs, if living, and against all of the defendants, if living. *Calhoun v. Adams*, 43 Ark. 238 (1884).

The statutory process is not the only way in which judgments can be revived; a circuit court also has jurisdiction to extend a judgment because a judgment may be revived by bringing an ordinary civil action thereon. *Agribank v. Holland*, 71 Ark. App. 159, 27 S.W.3d 462 (2000).

Purpose.

Purpose of reviving judgment by means of scire facias is to preserve lien acquired by prior judgment. *Hinton v. Willard*, 215 Ark. 204, 220 S.W.2d 423 (1949).

Heirs.

The proceeding must be against the executor or administrator, not against the heir. *Powell v. Macon*, 40 Ark. 541 (1883).

Where the plaintiff is dead and his estate fully settled and the administration closed, his heirs are the owners of the judgment, and, being the real parties in interest, can sue out scire facias to revive judgment in their names. *Crane v. Crane*, 51 Ark. 287, 11 S.W. 1 (1888).

Original Judgment.

Errors and irregularities in the original judgment cannot be set up in defense of a scire facias to revive. *Calhoun v. Adams*, 43 Ark. 238 (1884).

Probate Court.

The provisions for reviving judgments have no application to the judgments of the probate court. *Rose v. Thompson*, 36 Ark. 254 (1880).

Res Judicata.

If defendant in scire facias action fails to set up counterclaim for credits due him on the judgment, he cannot later set up counterclaim for alleged credits in action brought by judgment creditor to set aside certain deeds to real estate executed by judgment debtor to other parties. *Hinton v. Willard*, 215 Ark. 204, 220 S.W.2d 423 (1949).

Failure of defendant in second revival of judgment by scire facias to appear and contest revival on the ground that first revival had been obtained without service of a writ of scire facias barred subsequent attack on validity of second revival proceeding in suit by plaintiff involving garnishment of stock owned by defendant. *Lewis v. Bank of Kensett*, 220 Ark. 273, 247 S.W.2d 354 (1952).

Revival.

Scire facias issued by clerk started process of reviving judgment; from that date,

rights, if any, were fixed and interested parties were on notice from that date. *Bohnsack v. Beck*, 294 Ark. 19, 740 S.W.2d 611 (1987).

Under § 16-65-117, a lien expires unless it is revived under this section. Lien expired pursuant to § 16-65-117 where the judgment creditor did not comply with this section, and the mere fact that it was made a party to a lawsuit during the existence of the lien did not in itself prevent the subsequent expiration of the lien. *Refco, Inc. v. Heinhold Commodities, Inc.*, 295 Ark. 32, 746 S.W.2d 375 (1988).

Even though Arkansas provides a ten-year period for the enforcement of all judgments and that this period also applies to judgments revived in this state, where a judgment was revived in Illinois under that state's 20-year statute of limitations, and registration and enforcement were then sought in Arkansas, this state would give full faith and credit to the validly revived Illinois judgment. *Durham v. Arkansas Dep't of Human Services/Child Support Enforcement Unit*, 322 Ark. 789, 912 S.W.2d 412 (1995).

This section does not provide for revival of a judgment by a subsequent acknowledgment of debt. *Malone v. Malone*, 338 Ark. 20, 991 S.W.2d 546 (1999).

Second Judgment.

In a scire facias to revive a judgment, it is error to render a new judgment for the debt or damages. *Hanly v. Adams*, 15 Ark. (2 Barber) 232 (1854).

In scire facias proceeding upon a judgment of a justice of the peace which has been filed with circuit clerk as provided by law, it is not error to allow an amendment to the justice's judgment. *Crane v. Crane*, 51 Ark. 287, 11 S.W. 1 (1888).

Service of Process.

Constructive service on a nonresident in the mode provided by this and the following section is sufficient. *Waldstein v. Williams*, 101 Ark. 404, 142 S.W. 834 (1912).

Personal service is not required. *Bohnsack v. Beck*, 294 Ark. 19, 740 S.W.2d 611 (1987).

Several Defendants.

A scire facias to revive and continue the lien of a judgment must be issued against all the defendants jointly, if all are living; and a judgment in favor of one defendant on the plea of nul tiel record enures to the

benefit of and discharges the others. *Bolinger v. Fowler*, 14 Ark. (1 Barber) 27 (1853).

Timeliness.

In a scire facias to revive a judgment, it is error to render a new judgment for the debt or damages; also, to adjudge that it be revived from the date of the issuance of the writ, where the lien has expired before the suing out of the scire facias. *Hanly v. Adams*, 15 Ark. (2 Barber) 232 (1854).

Where a scire facias is sued out before the termination of the lien of a judgment but the judgment reviving the lien was not entered until after the period of three (now ten) years had expired since the judgment was rendered, the judgment of revival relates back to the issuance of the scire facias. *Waldstein v. Williams*, 101 Ark. 404, 142 S.W. 834 (1912).

The date of payment on a judgment is the time from which a new period of life for ten years begins to run. *Pepin v. Hoover*, 205 Ark. 251, 168 S.W.2d 390 (1943).

In suit by judgment debtor to set aside revival of judgment on ground that order of revivor was entered more than ten years after original judgment, although suit to revive judgment had been started prior to end of ten year period, the judgment cannot be set aside, as statute of limitations is governed by issuance of writ, and not by entry of order of revivor. *General Am. Life Ins. Co. v. Cox*, 215 Ark. 860, 223 S.W.2d 775 (1949).

A scire facias writ was properly issued by the trial court for the revival of a judgment where the ten-year limitation period on the effectiveness of the judgment had not yet run, even though the original judgment lien had expired. *Burton v. Bank of Tuckerman*, 276 Ark. 538, 637 S.W.2d 577 (1982).

No time limit is placed on service of writ of scire facias; ARCP 4(i) is not intended to govern writs under this section. *Bohnsack v. Beck*, 294 Ark. 19, 740 S.W.2d 611 (1987).

No scire facias to revive a judgment for accrued child support arrearages could be filed more than 10 years after the date of the judgment. *Malone v. Malone*, 338 Ark. 20, 991 S.W.2d 546 (1999).

Cited: *Waldstein v. Williams*, 101 Ark. 404, 142 S.W. 834 (1912); *Epperson v. Singleton*, 247 Ark. 1006, 449 S.W.2d 203 (1970); *United States v. Plant*, 56 F.R.D.

613 (W.D. Ark. 1972); *Burton v. Bank of Tuckerman*, 276 Ark. 504, 637 S.W.2d 573 (1982); *Ewing v. Cargill, Inc.*, 324 Ark. 217, 919 S.W.2d 507 (1996).

16-65-502. Survival or revival of judgment upon death of a party.

(a)(1) If one (1) or more plaintiffs in a judgment or decree dies before the judgment or decree is satisfied or carried into effect, the judgment or decree, if for money or concerning personal property, shall survive to the executors or administrators of the deceased party and, if concerning real estate, to his or her heirs or devisees.

(2) In each of the preceding cases, execution may be sued out in the name of the surviving plaintiff for the benefit of himself or herself and legal representatives of the deceased party, or the judgment or decree may be revived in the name of the legal representatives and the surviving plaintiff and execution may be sued out jointly.

(b)(1) When there are several defendants in a judgment or decree and some of them die before the judgment or decree is satisfied or carried into effect, the judgment or decree, if for money or concerning personal property, shall survive against the executor or administrator of the deceased party and, if concerning real estate, against his or her heirs or devisees.

(2) In each of the cases mentioned in subdivision (b)(1) of this section, execution may be issued in the name of the surviving plaintiff for the benefit of himself or herself and the legal representatives of any deceased plaintiff or in the name of the surviving plaintiff and the representatives of any deceased plaintiff against any surviving defendant.

(c) The term "real estate", as used in this act, shall be construed to include all estates and interest in lands and tenements, whether legal or equitable, liable to be sold under execution.

History. Rev. Stat., ch. 84, §§ 12-15, 34; C. & M. Dig., §§ 6284, 6308, 6309, 6311, 6312; Pope's Dig., §§ 8240, 8263, 8264, 8266, 8267; A.S.A. 1947, §§ 29-129, 29-608 — 29-611.

Meaning of "this act". Rev. Stat., ch. 84 codified as §§ 16-65-113, 16-65-116, 16-65-501 — 16-65-505, 16-65-601, 16-65-602, 16-66-411.

CASE NOTES

ANALYSIS

In general.
Child support.
Revivor.

In General.

The death of a judgment-defendant does not defeat the action against him as the plaintiff may proceed against the judgment-defendant's representative. *Finn v. Crabtree*, 12 Ark. (7 English) 597 (1852).

Child Support.

Administrator of mother's estate had standing to sue to cover the arrears the father owed in child support, insurance premiums, and medical expenses at the time of her death, even though the father had custody of the children at the time of the suit. *Darr v. Bankston*, 327 Ark. 723, 940 S.W.2d 481 (1997).

Revivor.

Trustee, original party with mortgagee

to action to foreclose deed of trust, who was appointed administrator of mortgagee's estate, was entitled, without revivor of the action, to enforce decree authorizing sale of property which had become final

during mortgagee's lifetime. *Hayes v. Whyte*, 193 Ark. 918, 103 S.W.2d 628 (1937).

Cited: *Price v. Hemingway*, 179 Ark. 846, 18 S.W.2d 351 (1929).

16-65-503. Revival against administrators in succession.

If any executor or administrator who is a plaintiff or defendant in any judgment or decree dies, resigns, or is dismissed before the judgment or decree is satisfied or carried into effect, the judgment or decree may be revived by or against the administrator in succession in the manner provided for in this subchapter.

History. Rev. Stat., ch. 84, § 18; C. & M. Dig., § 6315; Pope's Dig., § 8270; A.S.A. 1947, § 29-615.

16-65-504. Revival of judgment against personal representatives, heirs, and devisees of deceased defendant.

(a) A judgment may be revived against the personal representatives, heirs, and devisees, or any of them, of a deceased defendant by an action in circuit court without verification of the complaint.

(b) A judgment or decree may be revived against the representatives of any deceased defendant by scire facias in the name of:

- (1) The name of the surviving plaintiff; and
- (2) Those plaintiffs who are deceased.

History. Rev. Stat., ch. 84, § 16; Civil Code, § 442; C. & M. Dig., §§ 6310, 6313; Pope's Dig., §§ 8265, 8268; A.S.A. 1947, §§ 29-612, 29-613; Acts 2003, No. 1185, § 198.

Amendments. The 2003 amendment substituted "in circuit court" for "prosecuted by proceedings at law" in (a).

16-65-505. Executions issued against defendant and deceased defendants' representatives.

Executions may be issued against the surviving defendant and the representatives of the deceased defendants or such of them as are jointly made parties.

History. Rev. Stat., ch. 84, § 17; C. & M. Dig., § 6314; Pope's Dig., § 8269; A.S.A. 1947, § 29-614.

SUBCHAPTER 6 — SATISFACTION

SECTION.

- 16-65-601. Entry of disposition of judgment in judgment book.
 16-65-602. Entry of satisfaction.
 16-65-603. Judgments set off against each other.

SECTION.

- 16-65-604. Collection of judgment enjoined during pendency of action which may be usable as setoff.

Effective Dates. Acts 1993, No. 1184, § 5: Apr. 16, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to prevent unnecessary loss Arkansas Code 16-65-604, concerning prior judgements which may be enjoined when there may be

a setoff, should be revised. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

Am. Jur. 47 Am. Jur. 2d, Judgm., § 1004 et seq. **C.J.S.** 50 C.J.S., Judgm., § 656 et seq.

16-65-601. Entry of disposition of judgment in judgment book.

When satisfaction of a judgment or decree shall be acknowledged or entered by order of court, when satisfaction shall be made by execution, or when the judgment or decree shall be reversed or set aside, the clerk shall enter in the margin of the judgment book, opposite the judgment or decree, a memorandum of the disposition thereof, the date, and the book and page in which the evidence of the disposition is entered on record.

History. Rev. Stat., ch. 84, § 28; C. & M. Dig., § 6280; Pope's Dig., § 8236; A.S.A. 1947, § 29-701.

CASE NOTES

Joint Debtors.

Entry on record of satisfaction of a judgment in full as to one of two joint judgment debtors satisfies the judgment as to

both, though the entry recited that the judgment is not satisfied as to the other debtor. *Biggs v. Davis*, 184 Ark. 834, 43 S.W.2d 724 (1931).

16-65-602. Entry of satisfaction.

(a) Whenever the whole judgment shall appear to be satisfied by the return of an execution, it shall be the duty of the clerk to enter in the judgment book, in the space left for that purpose, "satisfied by execution".

(b)(1) Whenever a judgment is satisfied otherwise than upon an execution, it shall be the duty of the party or his or her attorney within sixty (60) days thereafter to enter satisfaction in the judgment book, which shall be sufficiently done by writing the words "satisfied in full", with the date of the entry and the signature of the party making it.

(2) The court may on motion and notice compel an entry of satisfaction to be made.

(3)(A) Satisfaction of a judgment or decree may be entered by the plaintiff in person, by his or her attorney of record, or by an agent duly authorized in writing for that purpose under the hand of the plaintiff.

(B) When the entry of satisfaction is made by an agent, his or her authority shall be filed in the office of the clerk of the court in which the judgment or decree may be.

(4) If the person receiving satisfaction for any judgment or decree neglects or fails to enter satisfaction within the time prescribed in subdivision (b)(1) of this section, the person shall forfeit and pay to the person against whom the judgment or decree may have been entered any sum not exceeding one hundred fifty dollars (\$150) nor less than five dollars (\$5.00), to be recovered in an action founded on this act.

(c)(1) If the person receiving satisfaction of any judgment or decree neglects or refuses to acknowledge the satisfaction of the judgment or decree within the time prescribed by subdivision (b)(1) of this section, the party interested may, on notice given to the adverse party or his or her attorney, apply to the court to have satisfaction entered.

(2) If the court is satisfied that the plaintiff or his or her agent or attorney has received full satisfaction of the judgment or decree, an order shall be made directing the clerk to enter satisfaction on the judgment or decree, which shall have the same effect as if it had been acknowledged by the party.

(3) The costs attending the application shall be recovered of the party so refusing, by execution, as in other cases.

(d) Satisfaction entered in accordance with the provisions of this section shall forever discharge and release the judgment or decree.

History. Rev. Stat., ch. 84, §§ 19-21, 23-26; C. & M. Dig., §§ 6325-6332; Pope's Dig., §§ 8280-8287; A.S.A. 1947, §§ 29-702 — 29-708.

Meaning of "this act". Rev. Stat., ch. 84 codified as §§ 16-65-113, 16-65-116, 16-65-501 — 16-65-505, 16-65-601, 16-65-602, 16-66-411.

CASE NOTES

ANALYSIS

In general.

Attorney's fees.

Improper entry.

Joint debtors.

Satisfaction set aside.

Subsequent term.

In General.

While § 16-65-603 makes no provision for satisfaction of judgment, the authority not expressly given by § 16-65-603 is provided in this section. *Roberts v. Feltman*, 55 Ark. App. 142, 932 S.W.2d 781 (1996).

Attorney's Fees.

Attorney's fees are not "costs" within the meaning of subsection (c) of this section. *Roberts v. Feltman*, 55 Ark. App. 142, 932 S.W.2d 781 (1996).

Improper Entry.

Satisfaction, though improper, is a bar,

so that orders issued in a foreclosure proceeding, subsequent to the entry of satisfaction, are void on their face and subject to collateral attack. *Fields v. Jarnagin*, 210 Ark. 1054, 199 S.W.2d 961 (1947).

Joint Debtors.

A release by the owners of a judgment of one of the three debtors jointly bound by it in consideration of the payment of a less sum than was due therefor will not operate to release the other two debtors where the instrument of release expressed on its face an intention not to release them. *Hadley v. Bryan*, 70 Ark. 197, 66 S.W. 921 (1902).

Satisfaction Set Aside.

Where a plaintiff purchases at his own execution sale property supposed to belong to the defendant and satisfies his judgment against the latter pro tanto, he will be entitled to have the satisfaction set

aside upon being compelled subsequently to account to a third person as the owner of the property. *De Loach Mill Mfg. Co. v. Little Rock Mill & Elevator Co.*, 65 Ark. 467, 47 S.W. 118 (1898).

Where a member of a partnership sold assets without consent of his partner in consideration of satisfaction of a decree in favor of the vendee, the sale was rescinded and the satisfaction set aside. *Rutherford v. McDonnell*, 66 Ark. 448, 51 S.W. 1060 (1899).

16-65-603. Judgments set off against each other.

(a) Judgments for the recovery of money may be set off against each other, having due regard to the legal and equitable rights of all persons interested in both judgments.

(b) The setoff may be ordered upon motion after reasonable notice to the adverse party, where both judgments are in the same court, or in an action for equitable relief in the court in which the judgment sought to be annulled by the setoff was rendered.

History. Civil Code, § 409; C. & M. Dig., § 6323; Pope's Dig., § 8278; A.S.A. 1947, § 29-709; Acts 2003, No. 1185, § 199.

Amendments. The 2003 amendment

Subsequent Term.

An order dismissing a cause as having been settled, made after the expiration of the term at which the judgment was rendered, was held not to vacate the judgment nor to constitute a proceeding under this section authorizing the court to direct the clerk to enter satisfaction of the judgment on the record. *Davis v. Oaks*, 187 Ark. 501, 60 S.W.2d 922 (1933).

substituted "for equitable relief" for "by equitable proceedings" in (b).

Cross References. Mutual judgments rendered before different justices of the peace set off, § 16-19-801.

CASE NOTES

ANALYSIS

Construction.
Applicability.
Attorneys' liens.
Contracts.
Employer and employee.
Exemptions.
Multiple parties.
Same transactions.

Construction.

Although § 16-56-102 and subsection (a) of this section permit judgments to be set off against each other, § 16-63-206(c) prevents the setoff of judgments assigned to the defendant after suit has been commenced against him. *Donoho v. Donoho*, 318 Ark. 637, 887 S.W.2d 290 (1994).

Section 16-56-102 and subsection (a) of this section are provisions generally authorizing that a demand, right or course of action may be asserted by setoff and also permitting money judgments to be set off (having due regard to the legal and equitable rights of all persons interested in

both judgments), while § 16-63-206(c) is a specific provision governing the timeliness of setoffs, disallowing those judgments assigned to a defendant after the plaintiff commenced suit against the defendant; because these three provisions can be read in harmony, neither § 16-56-102 nor subsection (a) of this section impliedly repeal § 16-63-206(c). *Donoho v. Donoho*, 318 Ark. 637, 887 S.W.2d 290 (1994).

While this section makes no provision for satisfaction of judgment, the authority not expressly given by this section is provided in § 16-65-602. *Roberts v. Feltman*, 55 Ark. App. 142, 932 S.W.2d 781 (1996).

Applicability.

This section has no application to probate judgments and it is doubtful whether it applies to foreign judgments. *Weast v. Wickersham*, 136 Ark. 541, 195 S.W. 685 (1917).

Father had no right to set off the judgment owed to the state of Missouri against the child-support arrearages owed to him

by the mother; where the father would have had no set-off defense against the mother, he could not now assert the defense against the assignee, state of Missouri, and the fact that the mother later became delinquent on her child-support obligation to the father did not affect the State of Missouri's right to collection on its judgment. *Office of Child Support Enforcement v. Watkins*, 83 Ark. App. 174, 119 S.W.3d 74 (2003).

Attorneys' Liens.

Where one holding judgment against another moves to have it set off against a judgment against himself in the other's favor, his right thereto will not be defeated by a lien of the other's attorney subsequently filed on the latter judgment. *Park v. Hutchinson*, 80 Ark. 183, 96 S.W. 751 (1906).

A lien for attorney's fees in various suits without showing the amount recoverable in the particular suit cannot prevail against the right of the judgment debtor to set off a judgment rendered for him against the client. *Rachels v. Russell*, 154 Ark. 418, 242 S.W. 809 (1922).

Contracts.

A judgment may not only be set off against another judgment but may be used as a set-off against any claim founded on a contract. *Milner v. Camden Lumber Co.*, 74 Ark. 224, 85 S.W. 234 (1905).

Employer and Employee.

Court found that employer made himself liable for judgment against his employee and that the set-off or judgment was not allowable. *Matthews v. Blanks*, 68 Ark. 497, 60 S.W. 239 (1900).

Exemptions.

Where defendant, against whom judgment was obtained, purchased another judgment which had been rendered against plaintiff, defendant could not set off one judgment against the other where plaintiff scheduled his exemptions and his whole personal property, including his judgment against defendant, did not exceed the amount allowed as exempt property. *Atkinson & Co. v. Pittman*, 47 Ark. 464, 2 S.W. 114 (1886).

When a judgment creditor procured the sale of his debtor's exempt property, the creditor cannot in an action for damages for the sale thereof, set off against the debtor's judgment, his judgment against the debtor since that would destroy the exemption. *Ray v. Gregory*, 120 Ark. 50, 178 S.W. 405 (1915).

Multiple Parties.

Where both the judgment against defendant and defendant's successful cross-claim against co-defendant occurred in the same court and the chancellor complied with this section, the defendant was entitled to a setoff of his judgment for reimbursement and contribution against co-defendant. *Roberts v. Feltman*, 55 Ark. App. 142, 932 S.W.2d 781 (1996).

Same Transactions.

Where the plaintiff and defendant obtained judgments against each other growing out of the same transaction, defendant had no right to claim his right of action against plaintiff as exempt from the plaintiff's claim against him; the two causes of action having grown out of the same transaction, the one extinguishes the other pro tanto. *Harry v. Williams*, 122 Ark. 148, 182 S.W. 546 (1916).

16-65-604. Collection of judgment enjoined during pendency of action which may be usable as setoff.

During the pendency of an action, or while any claim, contract, or other obligation remains unsatisfied or unfulfilled which could be used as a setoff against a prior judgment in favor of the defendants or parties or any of them, the court shall enjoin and stay collection and enforcement of the prior judgment in favor of the defendants or parties upon such terms and conditions as the court deems necessary to prevent loss by insolvency, nonresidence, or otherwise.

History. Civil Code, § 410; C. & M. Dig., § 6324; Pope's Dig., § 8279; A.S.A. 1947, § 29-710; Acts 1993, No. 1184, § 1.

CHAPTER 66

EXECUTION OF JUDGMENTS

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. PROPERTY SUBJECT TO EXECUTION — EXEMPTIONS.
3. STAYING, QUASHING, OR VACATING WRIT.
4. LEVY AND SALE.
5. REDEMPTION.
6. UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT.

RESEARCH REFERENCES

<p>UALR L.J. Note, Constitutional Law — Writ of Execution Statutes Held Unconstitutional — Has the Due Process Notice Requirement Left Creditors Out in the</p>	<p>Cold? <i>Duhon v. Gravett</i>, 302 Ark. 358, 790 S.W.2d 155 (1990) 13 UALR L.J. 293. Survey, Debtor/Creditor Relations, 13 UALR L.J. 361.</p>
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SUBCHAPTER 1 — GENERAL PROVISIONS

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Effective Dates. Acts 1991, No. 389, § 5: Mar. 7, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that the ability of a judgment creditor to enlist the aid of local officials to execute against property of judgment debtors is essential to assure

that judgments can be satisfied in a peaceful and orderly manner; that since the ruling of the Arkansas Supreme Court in *Duhon v. Gravette*, 302 Ark. 358, 790 S.W.2d 155 (1990), no constitutional statutory procedure exists in this State, and has not existed for a period of several

months prior to the enactment of this legislation that permits the satisfaction of judgments through execution against property and that this act is immediately necessary to help assure the health, safety and welfare of judgment creditors and

judgment debtors. Therefore an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

Am. Jur. 30 Am. Jur. 2d, Exec., § 1 et seq.

C.J.S. 33 C.J.S., Exec., § 1 et seq.

16-66-101. Execution issued on final judgment order.

An execution may issue on any final judgment order of a court of record, in personam, for a liquidated sum of money and for interest and costs, or for costs alone.

History. Civil Code, § 672; C. & M. Dig., § 4253; Pope's Dig., § 5265; A.S.A. 1947, § 30-101.

Cross References. Enforcement of execution by state, § 16-106-107.

Execution after affirmance on appeal, § 16-67-326.

Execution for costs, § 16-68-410.

CASE NOTES

ANALYSIS

Issuance.

Joint execution.

Judgment in abeyance.

Jurisdiction.

Sheriff's deed.

Issuance.

Execution may issue on judgment though not directed by the judgment itself. *Morgan v. Scott-Mayer Comm'n Co.*, 185 Ark. 637, 48 S.W.2d 838 (1932).

Joint Execution.

A joint execution upon two separate judgments is void and is not amendable by the elimination of one of the judgments. *Bigham v. Dover*, 86 Ark. 323, 110 S.W. 217 (1908).

Judgment in Abeyance.

The court rendering the judgment had no power, in the absence of a stay or supersedeas pending appeal, to withhold execution beyond period fixed by former statute governing time of execution.

Sharum v. Dodson, 264 Ark. 57, 568 S.W.2d 503 (1978).

It was error for the trial court to order judgment held in abeyance so long as the husband paid small amount per month on the wife's judgment against him; therefore, case was remanded to the trial court for reconsideration of what amount should be paid to justify withholding contempt. *Sharum v. Dodson*, 264 Ark. 57, 568 S.W.2d 503 (1978).

Jurisdiction.

Defendant's contacts, past and present, with state held sufficient to sustain the trial court's exercise of jurisdiction in garnishment proceeding. *Levi Strauss & Co. v. Crockett Motor Sales, Inc.*, 293 Ark. 502, 739 S.W.2d 157 (1987).

Sheriff's Deed.

Sheriff's deed issued to wife on an execution based on arrearage of husband on support was not valid where there was no judgment in favor of wife for arrearage. *Frazier v. Hanes*, 220 Ark. 765, 249 S.W.2d 842 (1952).

16-66-102. Execution on registered judgment from another county.

The circuit court of any county in this state in which a judgment rendered by a court of competent jurisdiction in another county of this state has been registered in accordance with the provisions of § 16-65-117(a)-(c) shall have power to issue writs of execution upon any such judgment.

History. Acts 1967, No. 202, § 1; A.S.A. 1947, § 30-103.1.

CASE NOTES

ANALYSIS

Construction.
Applicability.

Construction.

The phrase "writs of execution" is not some generic designation of all forms of execution and, instead, is a reference to one specific form of collecting on a judg-

ment. *Moory v. Quadras, Inc.*, 333 Ark. 624, 970 S.W.2d 275 (1998).

Applicability.

This section does not apply to issuance of a writ of garnishment based solely on a registered judgment rendered from a court in another county. *Moory v. Quadras, Inc.*, 333 Ark. 624, 970 S.W.2d 275 (1998).

16-66-103. Execution may issue until collection barred.

An execution may be issued upon a judgment at any time until the collection of it is barred by the statute of limitations, although no execution may have been previously issued within a year and a day.

History. Civil Code, § 436; C. & M. Dig., § 4259; Pope's Dig., § 5271; A.S.A. 1947, § 30-103.

Cross References. Limitation of action on judgment, § 16-56-114.

CASE NOTES

ANALYSIS

Judgment liens.
Justices of the peace.
Running of statute.

Judgment Liens.

Judgment creditor may issue an execution on the judgment at any time within ten years after its rendition. *Bird v. Kitchens*, 215 Ark. 609, 221 S.W.2d 795, cert. denied, 338 U.S. 892, 70 S. Ct. 241, 94 L. Ed. 548 (1949).

Justices of the Peace.

Executions cannot issue on judgments of justices of the peace after five years.

Trammell v. Anderson, 52 Ark. 176, 12 S.W. 328 (1889).

Running of Statute.

Process may be issued at any time before the enforcement of a judgment is barred and a break in the running of the statute of limitations will constitute the commencement of a new period not only for an action to enforce the judgment but for the issuance of process. *Koontz v. La Dow*, 133 Ark. 523, 202 S.W. 686 (1918).

The date of payment on a judgment is the time from which a new period of life begins to run. *Pepin v. Hoover*, 205 Ark. 251, 168 S.W.2d 390 (1943).

You are finally commanded to fully perform this writ, to recover said property or sums, to make return of this writ within the statutory period required by law, and to serve the Notice attached to this writ.

In Witness Whereof, I have set my hand and official seal this _____
(day)

day of _____, _____
(month) (year)

(Title)

(Seal)"

(b) FORM — VARIANCES. The form of the writ of execution in subsection (a) of this section may be varied to suit each particular case.

(c) NOTICE TO DEFENDANT. Upon application for a writ of execution by a qualified judgment creditor, the clerk of the court shall attach to the writ set forth in subsection (a) of this section the following notice:

"NOTICE TO DEFENDANT OF YOUR RIGHT TO CLAIM CERTAIN PROPERTIES AS BEING EXEMPT FROM EXECUTION.

The writ of execution delivered to you with this Notice means that certain properties belonging to you have been executed upon in order to pay a court judgment against you. **HOWEVER, YOU MAY BE ABLE TO KEEP YOUR PROPERTY FROM BEING TAKEN, OR TO SUBSTITUTE THE PROPERTY THAT IS TAKEN, SO READ THIS NOTICE CAREFULLY.**

State and federal laws say that certain property may not be taken to pay certain types of court judgments. This money or property is said to be 'exempt' from execution.

You have the right to petition the court within twenty (20) days to claim an exemption. If your claim of an exemption is contested, the court shall promptly hold a hearing after your claim has been filed. **YOU MUST IMMEDIATELY SERVE A COPY OF YOUR CLAIM UPON THE PARTY SEEKING EXECUTION."**

(d) SERVICE AND RETURN OF NOTICE TO DEFENDANT — MAILING OF COPIES.

(1) The notice to defendant together with a copy of the writ of execution shall be served on the judgment debtor by:

(A) An officer authorized to serve process simultaneously with seizure or levy of property; or

(B) The judgment creditor in the same manner as service of writs or summons before the day the officer authorized to serve process seizes or levies on property of the judgment debtor.

(2) If the judgment creditor mails the writ of execution and the notice to defendant, as provided in subdivision (d)(1)(B) of this section, the mail shall be sent to the last known address of the judgment debtor. However, if the writ and notice are refused, unclaimed, or cannot be delivered by the post office, or if the residence address of the judgment debtor is not discoverable after diligent search, then the writ of execution and the notice to defendant shall be sent first-class mail to

the judgment debtor at his or her last known residence address and, if known, his or her last place of employment.

(e) **MAILING OF ANNUAL NOTICE.** The judgment creditor shall not be required to serve another notice to defendant on the judgment debtor, by mail or otherwise, for future writs of execution on the same debt within one (1) year of the original writ of execution. If further writs of execution on the same debt are filed thereafter, then the notice shall be required to be served by the judgment creditor annually.

(f) **CERTIFICATE OF SERVICE STATEMENT.** The circuit clerk shall include as a part of the writ of execution a certification statement of the service required in subsection (d) of this section on the judgment debtor. The judgment creditor, or the authorized officer serving the writ, must complete the certificate of service statement by listing the name and address of the judgment debtor and the date of mailing. The statement must be signed by the judgment creditor or his or her attorney.

(g) **HEARING.** Upon filing a claim of exempt property, a prompt hearing shall be held to determine the validity of the claimed exemptions. Provided, no hearing shall be required and a writ of supersedeas shall issue as to the claimed exemption or exemptions if the judgment creditor files a statement in writing that the judgment debtor's claim of exemption is not contested.

(h) **TIME TO CLAIM EXEMPTION.** Upon receipt of a writ of execution and notice to defendant, the judgment debtor shall have twenty (20) days from such receipt to file a petition to claim any of the exemptions provided by law.

History. Civil Code, § 673; C. & M. 5267; A.S.A. 1947, §§ 30-106, 30-107; Acts Dig., §§ 4254, 4255; Pope's Dig., §§ 5266, 1991, No. 389, § 1.

RESEARCH REFERENCES

UALR L.J. Survey — Debtor/Creditor Relations, 14 UALR L.J. 767.

CASE NOTES

ANALYSIS

Amendment.
Harmless error.
Jurisdiction.

Amendment.

An execution may be amended. *Blanks v. Rector*, 24 Ark. (11 Barber) 496 (1866); *Bridewell v. Mooney*, 25 Ark. 524 (1869).

An execution without a seal is amendable and, when amended by affixing the seal, relates back to its issuance. *Hall v. Lackmond*, 50 Ark. 113, 6 S.W. 510 (1887).

Harmless Error.

The words "and company" after the defendant's name is a mere irregularity and

does not avoid the execution; it is good as against the defendant. *Hawkins v. Taylor*, 56 Ark. 45, 19 S.W. 105 (1892).

Jurisdiction.

A writ of execution or garnishment after a judgment in the circuit or chancery court is issuable only from the court in which the judgment was rendered. *McGehee Bank v. Charles W. Greeson & Sons*, 223 Ark. 18, 263 S.W.2d 901 (1954).

Cited: 555, Inc. v. Barlow, 3 Ark. App. 139, 623 S.W.2d 843 (1981); *Vinson Elec. Supply, Inc. v. Poteete*, 321 Ark. 516, 905 S.W.2d 831 (1995); *Moory v. Quadras, Inc.*, 333 Ark. 624, 970 S.W.2d 275 (1998).

16-66-105. Debt, damages, and costs endorsed on execution.

Every clerk of the courts of record in this state shall endorse upon every execution issued by him or her the debt, damages, and costs to be recovered before delivery of the execution to the officer by whom it is to be executed.

History. Rev. Stat., ch. 60, § 11; C. & M. Dig., § 4267; Pope's Dig., § 5279; A.S.A. 1947, § 30-104. Indorsement of costs on execution, § 16-68-501.

Cross References. Fees of officers to be indorsed on execution, § 16-68-502.

16-66-106. Joint execution when judgment against several.

On a judgment or decree against several, the execution must be joint.

History. Civil Code, § 674; C. & M. Dig., § 4257; Pope's Dig., § 5269; A.S.A. 1947, § 30-108.

16-66-107. Death of one or more plaintiffs.

(a) The death of one (1) or all the plaintiffs shall not prevent an execution being issued thereon. However, on such execution, the clerk shall endorse the death of such of them as are dead and, if all the plaintiffs are dead, the names of the personal representative or last survivor if the judgment passed to the personal representative, or the names of the survivor's heirs, if the judgment was for real property.

(b) Before making the endorsements set forth in subsection (a) of this section, an affidavit of the death shall be filed with the clerk by one (1) of the plaintiffs, or personal representatives or heirs, or their attorney, and that the persons named as such are the personal representatives or heirs. In the case of personal representatives, they shall also file with the clerk a certificate of their qualification in the proper court in this state.

(c) The sheriff, in acting upon an execution endorsed as provided in subsection (a) of this section, shall proceed as if the surviving plaintiff or plaintiffs, or the personal representative or heirs, were the only plaintiffs in the execution and shall take sale, stay, and forthcoming bonds accordingly.

(d) The defendant may move the court to quash an execution on the ground that the personal representative or heirs of a deceased plaintiff are not properly stated in the endorsement on the execution and, during the vacation of the court, may obtain an injunction, upon its being made to appear that the persons named are not entitled to the judgment on which the execution was issued.

History. Civil Code, §§ 437-439, 441; C. & M. Dig., §§ 4262-4264, 4266; Pope's Dig., §§ 5274-5276, 5278; A.S.A. 1947, §§ 30-109 — 30-112.

16-66-108. Death of part of defendants.

The death of part only of the defendants shall not prevent execution being issued which, however, shall operate alone on the survivors and their property.

History. Civil Code, § 440; C. & M. Dig., § 4265; Pope's Dig., § 5277; A.S.A. 1947, § 30-113.

16-66-109. Executions directed to any county without court order.

Executions issued upon any judgment, order, or decree rendered in any court of record may be directed to and executed in any county in this state without first procuring an order of the court for that purpose.

History. Rev. Stat., ch. 60, § 10; C. & M. Dig., § 4256; Pope's Dig., § 5268; A.S.A. 1947, § 30-114.

CASE NOTES**Jurisdiction.**

A writ of execution or garnishment after a judgment in the circuit or chancery court is issuable only from the court in

which the judgment was rendered. *McGehee Bank v. Charles W. Greeson & Sons*, 223 Ark. 18, 263 S.W.2d 901 (1954).

16-66-110. Endorsement of sheriff.

Every sheriff or other officer to whom any execution may be delivered shall endorse thereon the hour, day of the month, and year when it came to his or her hands.

History. Rev. Stat., ch. 60, § 25; C. & M. Dig., § 4269; Pope's Dig., § 5281; A.S.A. 1947, § 30-115.

16-66-111. Priority of writs.

If two (2) or more writs of execution come to the hands of the sheriff or another officer to whom execution may be delivered on the same day, the writ of execution which he or she first received shall have priority over the others and shall be executed accordingly.

History. Rev. Stat., ch. 60, § 25; C. & M. Dig., § 4269; Pope's Dig., § 5281; A.S.A. 1947, § 30-115.

16-66-112. Time execution attaches as lien.

An execution shall be a lien on the property in any goods or chattels, or the rights or shares in any stock, or on any real estate, to which the lien of the judgment, order, or decree extends or has been determined,

from the time the writ shall be delivered to the officer in the proper county to be executed.

History. Rev. Stat., ch. 60, § 24; C. & M. Dig., § 4276; Pope's Dig., § 5288; A.S.A. 1947, § 30-116.

CASE NOTES

ANALYSIS

Bank deposits.
Equity.
Priorities.

Bank Deposits.

Creditor's writ of execution did not create a lien in the debtor's bank deposits. In *re Frazier*, 136 Bankr. 199 (Bankr. W.D. Ark. 1991).

Equity.

Money decree in chancery court became a lien upon defendant's real property in the county on the date of rendition but did not become a lien on defendant's personal property until execution was issued and the writ delivered to the officer in the proper county to be executed. In *re Van Meter*, 135 F. Supp. 781 (W.D. Ark. 1955).

A money decree in and of itself does not establish a constructive trust or an equitable lien in absence of language in the decree to that effect. In *re Van Meter*, 135 F. Supp. 781 (W.D. Ark. 1955).

Priorities.

A sale of lands under a junior attachment does not release the lien of a prior attachment, and the money arising from

the sale is not to be applied in payment of the prior attachment. *Hanauer & Co. v. Casey*, 26 Ark. 352 (1870).

By making a prior levy of an execution on personal property, a constable secures a prior lien as against the sheriff subsequently levying upon the same property under execution. *Miller v. Grady*, 76 Ark. 270, 88 S.W. 963 (1905).

Where attorneys filed suit and summons was issued in action against defendants before judgment creditor obtained execution or garnishment of personal property and before writ was delivered to officer of proper county to be executed, attorneys' lien was superior to lien of judgment creditor. *Consolidated Underwriters of S.C. Ins. Co. v. Bradshaw*, 136 F. Supp. 395 (W.D. Ark. 1955).

A judgment which has ripened into a lien by virtue of this section is superior and paramount to an unrecorded mortgage. *Charlesworth Pontiac Co. v. Walker*, 238 Ark. 940, 385 S.W.2d 797 (1965).

Cited: *Vinson Elec. Supply, Inc. v. Poteete*, 321 Ark. 516, 905 S.W.2d 831 (1995); In *re Huffman*, — Bankr. —, 2002 Bankr. LEXIS 1845 (Bankr. E.D. Ark. June 20, 2002).

16-66-113. Alias execution.

(a) If an execution is issued and the plaintiff desires to take out another at his or her own proper costs, the clerk may issue the execution, though the previous execution has not been returned.

(b) If an execution is returned, in whole or in part, not satisfied, a new one may issue.

History. Civil Code, § 674; C. & M. Dig., §§ 4260, 4261; Pope's Dig., §§ 5272, 5273; A.S.A. 1947, §§ 30-117, 30-118.

CASE NOTES

Presumption.

One levy raises a presumption of suffi-

ciency. *Ford v. Bigger*, 80 Ark. 300, 97 S.W. 65 (1906).

16-66-114. Execution against corporations — Attachment.

(a) The first process upon a judgment against any private corporation shall be a fieri facias, which the sheriff or other officer shall levy on the moneys, goods and chattels, and lands and tenements of the corporation, and upon which he or she shall proceed as in other cases.

(b) If the sheriff or other officer returns upon any writ of fieri facias that no goods and chattels and lands and tenements can be found whereon to levy or if the property taken is not sufficient to satisfy the judgment, interest, and costs, then upon the application of the plaintiff or his or her attorney, the circuit court shall issue a writ of attachment against the rights and credits of the corporation, reciting the judgment, execution, and return, which shall be directed to the sheriff of the proper county.

(c) The attachment shall be executed by summoning as garnishee any person having any moneys or effects belonging to the corporation and any debtor to the corporation who may be found within the county to appear before the circuit court at the return of the writ and answer touching any moneys or effects of the corporation in his or her hands or any debt he or she may owe to the corporation.

(d) From the time of making service, all moneys and effects due and owing, payable, or belonging to the corporation shall be bound until the judgment is satisfied. No payment made thereafter to the corporation or other disposition of any debts, moneys, or effects so attached shall be credited to the garnishee making the payment nor shall the stock owned by the person in the corporation be allowed as a setoff.

(e) Proceedings against garnishees under the provisions of this section shall be the same as against the garnishees summoned in the case of absent and absconding debtors. However, no judgment shall be rendered against a garnishee for any debt to become due at a future day until after the debt shall become due.

(f) For all moneys paid by any garnishee under the provisions of this section, he or she shall have credit against the corporation to whom it is due.

(g) If a sufficient sum is not made to satisfy the judgment and costs, other writs of attachment may be issued as provided in this section, from time to time, until the whole is satisfied.

(h) If any money remains in the hands of the officer after satisfying the judgment and all costs, he or she shall pay the money to the corporation or its order.

(i) Nothing in the provisions of this section shall be so construed as to authorize the sale of any real or personal property belonging to the state or to any county, city, town, borough, or other public or municipal corporation regularly incorporated according to law, by virtue of any execution.

History. Rev. Stat., ch. 33, §§ 7-15; C. Dig., §§ 5286, 5357-5364; A.S.A. 1947, & M. Dig., §§ 4274, 4345-4352; Pope's §§ 30-801 — 30-809.

CASE NOTES

ANALYSIS

Drainage district.
Jurisdiction.

Drainage District.

The property of a drainage district is not included in this section. *Keith v. Drainage Dist. No. 7*, 183 Ark. 786, 38 S.W.2d 755 (1931).

Jurisdiction.

Where the creditor was located in Arkansas, the nonresident debtor wage

earner lived in another state, but the wage earner's employer was subject to suit in Arkansas, since it registered to do business and did business in this state, the trial court had jurisdiction of the garnishment action against the employer. *Levi Strauss & Co. v. Crockett Motor Sales, Inc.*, 293 Ark. 502, 739 S.W.2d 157 (1987).

Cited: *Miller v. Alamo*, 975 F.2d 547 (8th Cir. 1992); *Turner v. Farnam*, 82 Ark. App. 489, 120 S.W.3d 616 (2003).

16-66-115. Abstract of execution.

(a) The clerk shall keep a well-bound book in which he or she shall enter an abstract of all executions issued by him or her or out of his or her office, showing:

- (1) The date of the execution;
- (2) The names of the parties;
- (3) The amount of debt;
- (4) Damages;
- (5) Costs;
- (6) To what officer and county directed;
- (7) The return, if any; and
- (8) A reference to the book and page wherein the judgment, order, or decree whereon the execution issued is entered.

(b) Every clerk shall, moreover, keep a regular index in alphabetical order, to the abstract of executions, both by the names of the plaintiffs and of the defendants therein.

History. Rev. Stat., ch. 60, §§ 11, 12; §§ 5279, 5280; A.S.A. 1947, §§ 30-104, C. & M. Dig., §§ 4267, 4268; Pope's Dig., 30-105.

CASE NOTES

Cited: *Vinson Elec. Supply, Inc. v. Poteete*, 321 Ark. 516, 905 S.W.2d 831 (1995).

16-66-116. Conveyances by commissioners.

(a) Real property may be conveyed by a commissioner appointed by the court when:

- (1) By the judgment in an action, a party is ordered to convey that property to another; or
- (2) That property has been sold under a judgment or order of the court and the purchase money paid.

(b) The deed of the commissioner shall so refer to the judgment, orders, and proceedings authorizing the conveyance that the judgment, orders, and proceedings may be readily found.

(c) It shall be necessary for the conveyance to be signed by the commissioner only, without affixing the names of the parties whose title is conveyed. However, the names of the parties whose title is conveyed shall be recited in the body of the conveyance.

(d) The conveyance shall be recorded in the office in which, by law, it should have been recorded had it been made by the parties whose title is conveyed by it.

(e)(1) A conveyance made in pursuance of a judgment shall pass to the grantee the title of the parties ordered to convey the land.

(2) A conveyance made in pursuance of a sale ordered by the court shall pass to the grantee the title of all the parties to the action or proceeding.

(f) After a conveyance is ordered or adjudged, it shall not be necessary to revive the action if any of the parties shall die, but the conveyance in pursuance of the judgment or order shall be effectual to pass the title, notwithstanding the death of any of the parties.

History. Civil Code, §§ 428-435; C. & M. Dig., §§ 1507-1512; Pope's Dig., §§ 1816-1823; A.S.A. 1947, §§ 30-501 — 30-508; Acts 1989, No. 197, § 1.

Cross References. Quieting title, public sales, § 18-60-601 et seq.

CASE NOTES

ANALYSIS

Approval by court.
Death of party.
Payment.
Recordation.
Title.

Approval by Court.

Until confirmed, the sale is incomplete. *Wells v. Rice*, 34 Ark. 346 (1879); *Purcell v. Gann*, 113 Ark. 332, 168 S.W. 1102 (1914).

Conceding that conveyance executed and delivered without approval of court was ineffectual for conveying legal title, the purchaser nevertheless acquired an equitable title which can be asserted as a defense in a suit against him for the land. *Saint Louis & Ark. Lumber & Mfg. Co. v. Godwin*, 85 Ark. 372, 108 S.W. 516 (1908).

An endorsement upon a commissioner's deed of its approval, signed by the chancellor, is evidence that he examined and approved the deed when sitting as a court. *Jacks v. Kelley Trust Co.*, 90 Ark. 548, 120 S.W. 142 (1909).

Where the master's deed had not been judicially approved, a supplemental bill

filed to effectuate a foreclosure presented a proper case for the exercise of equity jurisdiction. *Ferguson v. Marble Sav. Bank*, 105 F.2d 592 (8th Cir. 1939).

Death of Party.

This section has no application to a question of revivor after the death of the defendant in a foreclosure proceeding and before confirmation. *De Yampert v. Manley*, 127 Ark. 153, 191 S.W. 905 (1917).

Payment.

Payment to commissioner is all that is required. *Graham v. W.W. Dickinson Hdwe. Co.*, 69 Ark. 119, 63 S.W. 58 (1901); *Morgan v. Kendrick*, 91 Ark. 394, 121 S.W. 278 (1909).

Recordation.

An unrecorded deed was good as between the parties and also against a subsequent purchaser of the land with notice. *Millman Lumber Co. v. Bryant*, 213 Ark. 277, 209 S.W.2d 878 (1948).

Title.

A decree in a personal action binds only the parties thereto and their privies and a

sale thereunder passes only such title as the parties thereto had at the time of the decree of sale. *Wilson & Beall v. Gaylord*, 77 Ark. 477, 92 S.W. 26 (1906).

A commissioner's deed which by mistake recites that it conveys the interest of the defendants' ancestor, instead of the

defendants themselves, is defective in form merely and should be reformed in chancery. *Gates v. Gray*, 85 Ark. 25, 106 S.W. 947 (1907).

Cited: *Steelman v. Planters Prod. Credit Ass'n*, 285 Ark. 217, 685 S.W.2d 800 (1985).

16-66-117. Bonds in executions and judicial sales.

(a) Every bond taken on the sale of property under an order or decree in equity or on the sale of property under execution, and every stay bond and forthcoming bond shall be signed by the principal and sureties and attested by the person taking the bond or someone in his or her presence.

(b) A bond so taken shall be returned to the proper officer with the report of the acts of the person taking it and, if taken under execution, the latter must be returned with the bond.

(c) All such bonds shall have the force and effect of a judgment on which an execution may issue. The execution shall be endorsed to the effect that no surety of any kind is to be taken.

(d) The officer taking any of the bonds described in subsection (a) of this section and his or her sureties, or their representatives, shall be jointly and severally liable to the person injured for any damages he or she may sustain by the officer's failing to discharge his or her duty in the taking of the bond.

(e)(1) If one (1) of several obligors or obligees in a bond having the force and effect of a judgment dies before the judgment is satisfied, execution may issue on the bond in the name of the surviving obligees against the obligors or the survivor.

(2) When all the obligees in a bond as specified in subdivision (e)(1) of this section die, their personal representatives may, if the bond is not satisfied, sue out execution thereon after its maturity against the obligors, or their personal representatives if all the obligors are dead, or if only some of the obligors are dead, against the survivor and the personal representatives of the deceased.

(f) When a bond having the force of a judgment is quashed, a new execution may issue on the original judgment at the instance of the plaintiff in the same manner as if that bond had never been given.

History. Civil Code, §§ 685-689; C. & M. Dig., §§ 4304-4310; Pope's Dig., §§ 5316-5322; A.S.A. 1947, §§ 30-601 — 30-605.

Cross References. Actions on bonds, § 16-107-201 et seq.

CASE NOTES

ANALYSIS

Execution sale.
Release.

Execution Sale.

A sale under execution on a bond is

strictly a statutory proceeding and no authority is given in the section authorizing a court to confirm a sale of real estate made thereunder or to order the sheriff to make the sale and make a deed to the purchaser or to issue a writ of possession.

Sumpter v. Hot Springs Sav. Trust & Guar. Co., 140 Ark. 91, 216 S.W. 311 (1919).

the release of property levied on to the extent of the value of such property. White, Wilson, Drew Co. v. Ahrens, 156 Ark. 588, 247 S.W. 73 (1923).

Release.

Sureties on a stay bond are released by

16-66-118. Defaults of officers.

(a) Each officer to whom any execution is delivered shall be liable and bound to pay the whole amount of money specified in or endorsed on the execution and directed to be levied if he or she:

(1) Neglects or refuses to execute or levy the execution according to law;

(2) Takes in execution any property, or if any property is delivered to him or her by any person against whom an execution may have been issued, and the officer neglects or refuses to make a sale of the property so delivered according to law;

(3) Does not return the execution on or before the return day specified therein;

(4) Makes a false return of the execution; or

(5) After having taken the defendant's body in execution, permits him or her to escape, and does not have his body according to the command of the writ.

(b) It shall be the duty of the clerk of the court from which any execution may be issued to endorse on the execution the time when it was returned.

(c) If the officer, on the return of any execution or at the time the execution ought to be returned, does not have the money which he or she may have become liable to pay as prescribed in subsection (a) of this section and does not pay the money over according to the command of the writ, any person aggrieved thereby may have his or her action against the officer and his or her securities, upon his or her official bond.

(d) If any officer sells any property under any execution, whether he or she received payment therefor or not, or makes the money specified in or endorsed on any execution and directed to be levied, or any part thereof, and does not have the amount of such sales or the money so made before the court and does not pay over the same according to law, he or she shall be liable to pay the whole amount of the sale or money by him or her made to the person entitled thereto, with lawful interest thereon, and damages in addition at the rate of ten percent (10%) per month to be computed from the time when the execution is made returnable until the whole is paid, to be recovered in an action against the officer and his securities on his or her official bond.

(e)(1) The party aggrieved may proceed against the officer by the motion before the court in which the writ is returnable in a summary manner, ten (10) days' previous notice of the intended motion being given, on which motion the court shall render judgment for the amount which ought to have been paid, with interest and damages as provided in subsection (d) of this section, and award execution thereon.

(2) The proceeding against any officer by motion in the manner prescribed in subdivision (e)(1) of this section shall not be construed to exempt the securities of the officer from liability.

(f)(1) It shall be the duty of every officer to whom any execution may be directed, issued on any judgment recovered on motion according to the provisions of subsections (d) and (e) of this section, to execute the execution within fifteen (15) days after it shall be delivered to him or her.

(2) The officer shall be subject to the same penalties and liabilities for every default therein as on other executions.

(g) If any sheriff or other officer to whom any execution may be legally directed refuses to receive the execution and execute it according to law, the officer shall be deemed guilty of a misdemeanor in office and shall also be liable to the party aggrieved for the amount of money specified in the execution, to be recovered against him or her and his or her securities on his or her official bond.

History. Rev. Stat., ch. 60, §§ 62-67; C. & M. Dig., §§ 4360-4365; Pope's Dig., §§ 5372-5377; A.S.A. 1947, §§ 30-1001 — 30-1006.

Publisher's Notes. Subdivision (a)(5)

appears to contemplate an imprisonment for debt which would contravene Ark. Const., Art. 2, § 16.

Cross References. Actions on bonds, § 16-107-201 et seq.

RESEARCH REFERENCES

UALR L.J. Survey — Debtor/Creditor Relations, 14 UALR L.J. 767.

CASE NOTES

ANALYSIS

In general.
Amendment of execution.
Death of officer.
Defenses.
Failure to levy.
Other legislation.
Return.
Standing.
Timeliness.
Waiver.

In General.

This section is highly penal. Mayfield Woolen Mills v. Lewis, 89 Ark. 488, 117 S.W. 558 (1909); Mayfield Woolen Mills v. Lewis, 97 Ark. 149, 133 S.W. 590 (1911); Endicott-Johnson Corp v. Davis, 186 Ark. 788, 56 S.W.2d 178 (1933).

While the language of the section is broad, it is sufficiently specific to cover executions issuing from any court created by the Constitution or by its authority.

Lewis v. J.C. Pearson Co., 118 Ark. 271, 176 S.W. 160 (1915).

This section is highly penal and the person seeking to enforce the penalty must bring himself within both the letter and the spirit of the statute. G.F. Harvey Co. v. Huddleston, 125 Ark. 522, 189 S.W. 181 (1916).

This section is penal and is enforced only where the sheriff knew or by ordinary diligence could have ascertained that defendant had property subject to execution. McIlroy Banking Co. v. Mills, 178 Ark. 741, 11 S.W.2d 481 (1928).

Amendment of Execution.

An officer's liability is not increased by amending the execution. Jones v. Goodbar, 60 Ark. 182, 29 S.W. 462 (1895).

Death of Officer.

The action under this section is for breach of contract and survives, on the death of the officer, against his adminis-

trator and sureties. *Wilson v. Young*, 58 Ark. 593, 25 S.W. 870 (1894).

When a constable dies before the time expires for making the return the sureties are not liable for the penalty. *Wm. R. Moore & Co. v. Rooks*, 71 Ark. 562, 76 S.W. 548 (1903).

Defenses.

In proceedings by judgment creditor against sheriff for failure to return execution, it is neither a defense that the defendant in the execution was insolvent and the plaintiff not damaged, nor that the deputy sheriff endorsed a return upon the execution and finding the clerk absent when he went to file it, was later prevented from doing so because of official duties. *Atkinson v. Heer & Co.*, 44 Ark. 174 (1884).

The irregularity of an execution is no excuse to a sheriff for failure to execute and return it, unless the irregularity be such as to render it void. *Jett v. Shinn*, 47 Ark. 373, 1 S.W. 693 (1886).

Irregularities in the execution are no defense to an action for a failure to return. *Jones v. Goodbar*, 60 Ark. 182, 29 S.W. 462 (1895).

A sheriff is not liable for a failure to return an execution in time, if he acted in obedience to instructions from the plaintiff's attorney. *Bickham v. Kosminsky*, 74 Ark. 413, 86 S.W. 292 (1905).

An officer can defend against a violation of this section when sued by the plaintiff in execution by showing that his omission to perform the duty was due to the conduct or instructions of the plaintiff or of his attorney of record. *G.F. Harvey Co. v. Huddleston*, 125 Ark. 522, 189 S.W. 181 (1916).

Summary judgment granted for sheriff where the judgment creditor's attorney mailed the original writ to the sheriff and he mailed it back to the attorney asking attorney to make a specific listing of property, but the plaintiff's attorney never advised the sheriff of any specific property and kept the writ past the deadline for filing with the clerk; a judgment creditor cannot benefit from any direct or indirect act that contributes to the officer's omission to perform his duty. *Vinson Elec. Supply, Inc. v. Poteete*, 321 Ark. 516, 905 S.W.2d 831 (1995).

Failure to Levy.

In order for a plaintiff to recover from a

constable for failure to make a levy upon the defendant's property pursuant to an execution issued, the plaintiff must prove that during the life of the writ of execution that his debtor was possessed of property liable to be seized under the writ and that the constable neglected to seize the property. *Peery v. Mauldin*, 120 Ark. 422, 179 S.W. 652 (1915).

Sheriff was not excused from executing on property because it was homestead; sheriff was under duty to execute on property, and he had no discretion in matter. Mandamus writ should have been issued to compel sheriff to levy execution. *State v. Sheriff of Lafayette County*, 292 Ark. 523, 731 S.W.2d 207 (1987).

Other Legislation.

Subsection (a) and (d) and subdivision (e)(1) were not repealed by the enactment of the Civil Code. *Wilson v. Young*, 58 Ark. 593, 25 S.W. 870 (1894).

Return.

An oral return is insufficient. *Jones v. Goodbar*, 60 Ark. 182, 29 S.W. 462 (1895).

Standing.

A judgment creditor, rather than a judgment debtor, has standing to sue a non-complying sheriff under this section. *Efurd v. Hackler*, 335 Ark. 267, 983 S.W.2d 386 (1998).

Timeliness.

Evidence was held to support a judgment for sheriff sued for delay, though the clerk's execution docket showed the execution was not timely returned. *State v. Warner*, 185 Ark. 610, 48 S.W.2d 246 (1932).

Waiver.

Where an execution was returned by the sheriff after the return day and subsequently the judgment on which it was issued was satisfied, the execution plaintiff cannot maintain an action against the sheriff for failure to return the execution within the prescribed time, as the acceptance of payment waived any cause of action growing out of the failure. *Powell v. Massey-Herdndon Shoe Co.*, 69 Ark. 79, 62 S.W. 66 (1901).

Cited: *Fort Smith Seed Co. v. Jones*, 198 Ark. 1012, 132 S.W.2d 364 (1939); *Saxon v. Purma*, 256 Ark. 461, 508 S.W.2d 331 (1974); *Miller v. Alamo*, 975 F.2d 547 (8th Cir. 1992).

16-66-119. Immunity of law enforcement officers.

Any sheriff or other law enforcement officer acting reasonably, in good faith, and not in violation of clearly established law, and exercising due care while serving and executing writs of execution shall have immunity from suit and civil liability and shall not be liable for any civil damages for acts performed in the official performance of his or her duties.

History. Acts 1991, No. 424, § 1.

RESEARCH REFERENCES

UALR L.J. Survey — Debtor/Creditor Relations, 14 UALR L.J. 767.

CASE NOTES

Cited: Vinson Elec. Supply, Inc. v. Poteete, 321 Ark. 516, 905 S.W.2d 831 (1995).

SUBCHAPTER 2 — PROPERTY SUBJECT TO EXECUTION — EXEMPTIONS**SECTION.**

- 16-66-201. Property subject to execution.
- 16-66-202. Married women's property subject to execution.
- 16-66-203. Encumbered property.
- 16-66-204. Leases subject to execution — Exception.
- 16-66-205. Exemption — Property of state.
- 16-66-206. Exemption — Improvements on public land.
- 16-66-207. Exemption — Family or public graveyards.
- 16-66-208. Exemptions — Wages — Penalty.
- 16-66-209. Exemption — Proceeds of life, health, accident, and disability insurance.
- 16-66-210. Homestead Exemption Act.
- 16-66-211. Claiming exemptions — Schedule of property — Stay of execution — Levy on remainder of property — Appeal.

SECTION.

- 16-66-212. Right of homestead not lost by failure to schedule — Wife may claim.
- 16-66-213. Appraisal of property claimed as exempt.
- 16-66-214. Effect of filing schedule — Sale stayed without bond — Penalty for sale of scheduled property.
- 16-66-215. Evasion of exemption law in collection of debt — Penalty.
- 16-66-216. Assignment or transfer of debt — Penalty for evasion.
- 16-66-217. Election of bankruptcy exemptions.
- 16-66-218. Exemptions from execution under federal bankruptcy proceedings.
- 16-66-219. Wedding rings exempt.
- 16-66-220. Pension and profit-sharing plans.
- 16-66-221. Schedule of property — Filing.

Cross References. Exemptions from execution, Ark. Const., Art. 9.

Workers' compensation payments, exemption, § 11-9-110.

Effective Dates. Acts 1840, § 3, p. 9: effective on passage.

Acts 1855, § 13, p. 196: effective on passage.

Acts 1861, No. 196, § 3: effective on passage.

Acts 1871, No. 58, § 6: effective on passage.

Acts 1873, No. 126, § 12: effective on passage.

Acts 1875 (Adj. Sess.), No. 23, § 2: effective on passage.

Acts 1877, No. 53, § 5: effective on passage.

Acts 1887, No. 64, § 3: effective on passage.

Acts 1891, No. 3, § 2: effective on passage.

Acts 1909, No. 195, § 2: effective on passage.

Acts 1953, No. 164, § 4: Feb. 27, 1953. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that existing law pertaining to the garnishment of wages of laborers and mechanics is indefinite and confusing, causing hardship to both creditor and debtor, that there is urgent need for clarification of such laws, and that enactment of this bill will provide for more efficient administration of justice. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

Acts 1953, No. 205, § 3: Mar. 4, 1953. Emergency clause provided: "Whereas an injustice is worked on some creditors; this Act should become effective immediately. Therefore, this Act being necessary for the immediate preservation of public peace, health and welfare, an emergency is hereby declared to exist, and this Act shall be in full force and effect from and after its passage and approval."

Acts 1981, No. 663, § 9: Mar. 23, 1981. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that existing law relating to homestead does not in all circumstances provide for equal treatment between the sexes, that the constitutionality of such existing law has been drawn into question by decisions of the United States Supreme Court and the Arkansas Supreme Court, and that there is an urgent need to insure that the law provides equality in the rights and interests of a surviving spouse in the homestead of his or her deceased spouse, without reference to the sex of the surviving spouse. There-

fore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

Acts 1981, No. 714, § 75: Mar. 25, 1981. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that the existing law relating to such matters as homestead, dower, curtesy, statutory allowances payable from a decedent's estate, and the right of a surviving spouse to take against the will of a decedent, do not in all circumstances provide for equal treatment between the sexes, that the constitutionality of such existing law has been drawn into question by decisions of the United States Supreme Court and the Arkansas Supreme Court, and that there is an urgent need to insure that the law provides equality in the property rights and interests of married persons. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

Acts 1989, No. 282, § 4: Mar. 1, 1989. Emergency clause provided: "It is hereby found and determined by the Seventy-Seventh General Assembly of the State of Arkansas that when land contiguous to a city is annexed certain landowners homestead rights are compromised by the annexation and that in fairness to the previously rural homestead owner, they should be allowed to retain their rural homestead status as long as the land on which the homestead is located remains rural in nature and is used for agricultural purposes. Therefore, in order to correct this inequity, an emergency is hereby declared to exist, and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1991, No. 345, § 6: Mar. 5, 1991. Emergency clause provided: "The courts of the United States, acting pursuant to the Bankruptcy Code of 1978, as amended, have declared certain of the provisions of Arkansas Code Annotated § 16-66-218 (Section 2 of Act 419, Acts of Arkansas, 1981) dealing with personal property exemptions to be unconstitutional. The result of such decisions is that residents of

Arkansas who must file bankruptcy proceedings may be limited to the sum of five hundred dollars (\$500) in personal property as provided by the Constitution of Arkansas, even though there has not been any decision of the Supreme Court of Arkansas as to a question arising under the Constitution of the State of Arkansas. Therefore, in order to give the citizens of

the State of Arkansas an opportunity to enjoy the rights granted by the Federal Government, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Liquor license as subject to execution or attachment. 40 ALR 4th 927.

Am. Jur. 30 Am. Jur. 2d, Exec., § 88 et seq.

Ark. L. Rev. Laurence, Enforcing a Money Judgment Against the Defendant's Stocks and Bonds: A Brief Foray into the

Forbidding Realms of Article Eight and the Fourth Amendment, 38 Ark. L. Rev. 561.

Note, In re Holt: Personal Property Exemptions and the Forgotten Arkansas Constitution, 42 Ark. L. Rev. 759.

C.J.S. 33 C.J.S., Exec., § 18 et seq.

16-66-201. Property subject to execution.

The following described property shall be liable to be seized and sold under any execution upon any judgment, order, or decree of a court of record:

- (1) All goods and chattels not exempted in this subchapter;
- (2) All improvements on the public lands of the United States;
- (3) The rights and shares in the stock of any bank, insurance company, or other incorporation;
- (4) Any current gold or silver coin, which shall be returned as so much money collected, without exposing the current gold or silver coin to sale;
- (5) Any bill or other evidence of debt issued by any moneyed corporation of this state or any other state, belonging to any person against whom an execution shall be issued, at the time the writ is delivered to the officer to be executed, or at any time thereafter;
- (6) All real estate, whether patented or not, of which the defendant or any person for his or her use, was seized on the day of rendition of the judgment, order, or decree upon which the execution is issued, or at any time thereafter.

History. Rev. Stat., ch. 60, § 23; C. & M. Dig., § 4270; Pope's Dig., § 5282; A.S.A. 1947, § 30-201; Acts 2003, No. 1185, § 200.

Amendments. The 2003 amendment, in (6), inserted "or her" and deleted "in law or equity" following "was seized."

CASE NOTES

ANALYSIS

In general.
Bill of debt.

Bond for title.
Burden of proof.
Death of defendant.
Homestead.

Levy without sale.

Mortgages.

Property not subject to execution.

Property subject to execution.

Release.

In General.

Real and personal property of the defendant under an execution upon any judgment may be sold to satisfy the execution. *Keith v. Drainage Dist.* No. 7, 183 Ark. 786, 38 S.W.2d 755 (1931).

Bill of Debt.

A bill of debt is a promissory note or a corporate debenture, not a bank account, and is governed by § 4-3-101 et seq. In re *Frazier*, 136 Bankr. 199 (Bankr. W.D. Ark. 1991).

Bond for Title.

A mortgagee has no interest subject to execution, but a vendee holding a bond for title has. *Burr v. Robinson*, 25 Ark. 277 (1868); *Young v. Mitchell*, 33 Ark. 222 (1878).

Interest of vendor who has given a bond for title is not subject to sale under execution. *Strauss v. White*, 66 Ark. 167, 51 S.W. 64 (1899). See *Howes v. King*, 127 Ark. 511, 192 S.W. 883 (1917).

Burden of Proof.

Prima facie, all of a debtor's property is subject to execution, and the burden is upon the party claiming it to show that it is exempt. *Blythe v. Jett*, 52 Ark. 547, 13 S.W. 137 (1889).

Death of Defendant.

If lands are levied on in the life of the debtor, they may be sold after his death. *Barber v. Peay*, 31 Ark. 392 (1876); *Hare v. Hall*, 41 Ark. 372 (1883).

Homestead.

When the estate was the homestead of a deceased wife and she left children, the purchaser takes subject to their use of it until each reaches the age of majority. *Thompson v. King*, 54 Ark. 9, 14 S.W. 925 (1890); *Littell v. Jones*, 56 Ark. 139, 19 S.W. 497 (1892).

Levy without Sale.

A levy without a sale is not a satisfaction of the judgment. *Black v. Nettles*, 25 Ark. 606 (1869).

Mortgages.

The right of a mortgagor to redeem his estate is liable to be taken upon execution

by judgment creditors. *State v. Lawson*, 6 Ark. (1 English) 269 (1845); *Whitmore v. Tatum*, 54 Ark. 457, 16 S.W. 198 (1891).

The estate of the mortgagee in land before foreclosure, or at least before entry, is not the subject of execution, though there has been a default, and the condition is forfeited. *Trapnall v. State Bank*, 18 Ark. (5 Barber) 53 (1856); *Harman v. May*, 40 Ark. 146 (1882); *Meadow v. Wise*, 41 Ark. 285 (1883).

Mortgaged personal property is not subject to execution for the debt of the mortgagor. *Jennings v. McIlroy*, 42 Ark. 236 (1883); *Buck v. Bransford*, 58 Ark. 289, 24 S.W. 103 (1893).

Levy may be made on a mortgagor's interest in a land contract. *Maxey v. Cooper*, 94 Ark. 296, 126 S.W. 842 (1910).

Property not Subject to Execution.

Lands bought by wife cannot be levied on to pay her husband's debt. *Allen v. Hightower*, 21 Ark. (8 Barber) 316 (1860).

Execution cannot issue on a judgment against an executor as such. *Hornor v. Hanks*, 22 Ark. (9 Barber) 572 (1861).

The property of a charitable institution is not subject to seizure. *Woman's Christian Nat'l Library Ass'n v. Fordyce*, 79 Ark. 532, 86 S.W. 417 (1905).

A contingent remainder is not subject to sale under execution. *Plumlee v. Bounds*, 118 Ark. 274, 176 S.W. 140 (1915).

Growing and immature crops cannot be sold under execution issued by justice of the peace. *First Nat'l Bank v. Evans*, 159 Ark. 182, 251 S.W. 712 (1923).

Property Subject to Execution.

A husband's right of curtesy in his deceased wife's estate is subject to sale under execution. *Stanley v. Bonham*, 52 Ark. 354, 12 S.W. 706 (1889).

A levy may be made on property conveyed for the purpose of hindering creditors. *A. Baldwin & Co. v. Williams*, 74 Ark. 316, 86 S.W. 423 (1905).

Levy may be made on the interest of a vendee in a land contract. *Evins v. Sandefur-Julian Co.*, 81 Ark. 70, 98 S.W. 677 (1906).

A partner's interest in partnership real estate may be sold under execution. *Jones v. Fletcher*, 132 Ark. 328, 200 S.W. 1034 (1918).

An execution may be levied on property conveyed to defraud creditors. *Horn v.*

Horn, 232 Ark. 723, 339 S.W.2d 852 (1960). excessive levy. Black v. Nettles, 25 Ark. 606 (1869).

Release.

A plaintiff may release an improper or

16-66-202. Married women's property subject to execution.

Whenever a judgment has been recovered against a married woman, the judgment may be enforced by execution against her sole and separate estate or property to the same extent and in the same manner as if she were sole.

History. Acts 1873, No. 126, § 8, p. 382; C. & M. Dig., § 5586; Pope's Dig., § 7236; A.S.A. 1947, § 30-203.

Cross References. Married woman's property not subject to debts of husband, Ark. Const., Art. 9, § 7.

CASE NOTES**Judgment against Husband.**

In suit against married woman to foreclose mortgage, it was error to render

judgment against her husband. Hiner v. Whitlow, 66 Ark. 121, 49 S.W. 353 (1899).

16-66-203. Encumbered property.

(a) Any property, real, personal, or mixed, may be subjected to seizure under execution, garnishment, attachment, or other process, even though the property is subject to mortgage, deed of trust, vendor's lien, conditional sales contract, chattel mortgage, or other lien. Any officer authorized by law to execute process, may seize, levy upon, or otherwise take possession of any property, whether real, personal, or mixed, even though there may be a lien against the property, and he or she may sell the property as provided by law.

(b)(1) Any prior lienholder or lienholders of any nature whatsoever shall be made a party or parties to the process, by the plaintiff or his or her attorney serving notice upon the lienholder or lienholders. This notice shall be served by any officer authorized to execute process. In the event the lienholder or lienholders are nonresidents of the State of Arkansas, then the plaintiff or his or her attorney shall give notice of the seizure of the property by registered mail to the lienholder or lienholders at their last known address. The return receipt of the lienholder or lienholders, or the affidavit of the plaintiff or his or her attorney, of the compliance with this subsection, shall be filed in the office of the clerk of the court from which the writ of garnishment, attachment, or other process is issued.

(2) Any sale made under the provisions of this section shall be made subject to the lienholder's or lienholders' indebtedness.

(c) This section shall not be construed to deprive any person or persons of their homestead or personal exemptions as provided by law.

History. Acts 1953, No. 205, §§ 1, 2; 1959, No. 183, § 1; A.S.A. 1947, §§ 30-219, 30-220.

RESEARCH REFERENCES

Ark. L. Rev. Rights of Junior Claimants to Encumbered Property, 7 Ark. L. Rev. 326.

Creditor's Rights — Attachment Revised, 26 Ark. L. Rev. 225.

Creditors' Provisional Remedies and Debtors' Due Process Rights: Attachment and Garnishment in Arkansas, 31 Ark. L. Rev. 607.

Nickles, A Localized Treatise On Secured Transactions — Part II: Creating Security Interests, 34 Ark. L. Rev. 559.

UALR L.J. Cathey, The Real Estate Installment Sale Contract: Its Drafting, Use, Enforcement and Consequences, 5 UALR L.J. 229.

CASE NOTES

ANALYSIS

Liens against seized property.
Property subject to seizure.

Liens Against Seized Property.

Tax lien did not attach to sale proceeds of judgment debtor's goods where no money remained after the payment of the judgment and the cost of the sale. *Miller v. Alamo*, 975 F.2d 547 (8th Cir. 1992).

Property Subject to Seizure.

Where two brothers in a continuous equal partnership sign a joint note for a loan to buy stock and pledge the stock as security for the loan, although one brother claims to sign as an endorser to avoid subjecting the stock to a judgment which his wife has obtained against him, his share of the stock is still subject to collection of the judgment. *Rice v. Rice*, 125 F. Supp. 900 (W.D. Ark. 1954).

16-66-204. Leases subject to execution — Exception.

Every unexpired lease of lands shall be subject to execution and sale as real estate; but this lease shall not be subject to sale under any execution issued by a justice of the peace.

History. Rev. Stat., ch. 60, § 73; C. & M. Dig., § 4271; Pope's Dig., § 5283; A.S.A. 1947, § 30-202.

Cross References. Jurisdiction of justices of the peace, Ark. Const., Art. 7, § 40.

CASE NOTES

Redemption.

Lease of land for farming purposes sold under execution may be redeemed as real

estate so sold. *Munson v. Wade*, 174 Ark. 880, 298 S.W. 25 (1927).

16-66-205. Exemption — Property of state.

No property, whether real, personal, or mixed, or effects, credits, choses in action, assets of any description, securities or moneys belonging to the state, either legally or equitably, or the title of which may be in the state, shall be subject to judgment, decree, execution, or sequestration, or be seized on or sold by virtue of any order, judgment, decree, or process of any court whatever.

History. Acts 1855, § 8, p. 196; C. & M. Dig., § 4273; Pope's Dig., § 5285; A.S.A. 1947, § 30-204.

16-66-206. Exemption — Improvements on public land.

It is unlawful to levy upon and sell under any execution or decree any improvement, or right of preemption upon the public lands within this state, any law, usage, or custom, to the contrary notwithstanding. However, no other improvement on the public lands, as provided for above, shall be so exempt, except those on which the defendant may reside or cultivate at the time of issuing the execution.

History. Acts 1840, § 1, p. 9; C. & M. Dig., § 4272; Pope's Dig., § 5284; A.S.A. 1947, § 30-205.

16-66-207. Exemption — Family or public graveyards.

(a) The clerk and recorder of deeds of the proper county, when any description of the metes and bounds of a family graveyard or public burial place shall be filed in his or her office, shall make a record of the description in the record of deeds, which shall be sufficient to exempt the land or burial place, not only from taxation, but also from execution.

(b) Not more than five (5) acres shall be so exempted under this section.

History. Acts 1861, No. 196, §§ 1, 2, p. 373; C. & M. Dig., § 4275; Pope's Dig., § 5287; A.S.A. 1947, §§ 30-206, 30-206n.

16-66-208. Exemptions — Wages — Penalty.

(a)(1) The wages of all laborers and mechanics not exceeding their wages for sixty (60) days shall be exempt from seizure by garnishment, or other legal process if the defendant in any case files with the court from which the process is issued a sworn statement that the sixty (60) days' wages claimed to be exempt is less than the amount exempt to him or her under the Constitution of the state, and that he or she does not own sufficient other personal property which, together with the sixty (60) days' wages, would exceed in amount the limits of the constitutional exemption.

(2) The party in whose favor the garnishment has been issued, and who asserts that a claim of exemption is invalid in whole or in part, by giving five (5) days' written notice to the person claiming the exemption, shall be entitled to a hearing before the court or judge issuing the garnishment upon the question of the validity of the claim of exemption. No supersedeas shall be issued for a period of five (5) days after the claim of exemption is made in order to provide time for the party in whose favor the garnishment has been issued to request such hearing. The notice required by this section shall be served by a person

authorized to serve a summons under § 16-58-107, and shall be filed in the office of the judge or the clerk issuing the garnishment.

(3)(A) If the claim of exemption is not valid, either in whole or in part, then the garnishment proceedings shall be stayed only as to such amount as the court may determine.

(B) If the claim of exemption is sustained, the wages of the person claiming such exemption shall not again be seized by garnishment or other legal process, for a period of sixty (60) days.

(b)(1) The first twenty-five dollars (\$25.00) per week of the net wages of all laborers and mechanics shall be absolutely exempt from garnishment or other legal process without the necessity of the laborer or mechanic filing a schedule of exemptions as provided in subsection (a) of this section.

(2) The term "net wages", as used in this subsection, shall mean gross wages less the deductions actually withheld by the employer for Arkansas income tax, federal income tax, social security, group retirement, and group hospitalization insurance premiums and group life insurance premiums.

(c) Any officer violating the provisions of this section shall be subject to the fines and penalty mentioned in § 16-66-214.

History. Acts 1875 (Adj. Sess.), No. 23, § 1, p. 24; 1909, No. 195, § 1, p. 574; C. & M. Dig., § 5546; Pope's Dig., § 7185; Acts 1951, No. 301, § 3; 1953, No. 164, § 1; 1967, No. 65, § 1; A.S.A. 1947, § 30-207.

RESEARCH REFERENCES

Ark. L. Rev. Garnishment of Wages, Exemptions, 7 Ark. L. Rev. 325.

Creditor's Rights — Attachment Reversed, 26 Ark. L. Rev. 225.

UALR L.J. Survey of Arkansas Law: Business Law, 4 UALR L.J. 161.

Legislative Survey, Business Law, 4 UALR L.J. 579.

Notes, Garnishment Procedures Must Provide For Notice to Postjudgment Debtor, etc., 9 UALR L.J. 517.

CASE NOTES

ANALYSIS

Constitutionality.
Applicability.
Equity.

Constitutionality.

This section is constitutional. *Birdsong v. Tuttle*, 52 Ark. 91, 12 S.W. 158 (1889); *Porter v. Navin*, 52 Ark. 352, 12 S.W. 705 (1889).

This section was intended to limit the right of exemption to debts by contract as provided by Const., art. 9, § 1. *Walker v. Walker*, 148 Ark. 170, 229 S.W. 11 (1921).

Because the statutes pertaining to postjudgment garnishment, this section,

§§ 16-66-211 and 16-110-401, do not require notice to the judgment debtor informing him of the garnishment, notice of possible state and federal exemptions, a prompt hearing to permit the judgment debtor to claim exemptions, an affidavit from the creditor stating that the writ would not cause the attachment of exempt funds, or the posting of a bond to compensate the judgment debtor for injury in case of wrongful garnishment, these sections do not contain sufficient procedural safeguards designed to prevent erroneous seizures to satisfy due process and are unconstitutional as violative of the due process clause of the Fourteenth Amendment of the United States Constitution.

Davis v. Paschall, 640 F. Supp. 198 (E.D. Ark. 1986).

Applicability.

This section is limited to residents of the state. Birdsong v. Tuttle, 52 Ark. 91, 12 S.W. 158 (1889).

A garnishee sued in another state could not claim exemption in behalf of a debtor residing in this state, the privilege being personal and available only by following the statutory procedure. Saint Louis S.W. Ry. v. Vanderberg, 91 Ark. 252, 120 S.W. 993 (1909).

A nonresident cannot claim the benefit

of the exemption laws of this state. Person v. Williams-Echols Dry Goods Co., 113 Ark. 467, 169 S.W. 223 (1914).

Equity.

The remedy being at law for abuse of process, equity will not interfere to prevent the repeated issuance of garnishments. Baxley v. Laster, 82 Ark. 236, 101 S.W. 755 (1907).

Cited: Duraclean Co. v. Foltz, 240 Ark. 38, 397 S.W.2d 804 (1966); Federal Sav. & Loan Ins. Corp. v. Holt, 97 Bankr. 997 (W.D. Ark. 1988).

16-66-209. Exemption — Proceeds of life, health, accident, and disability insurance.

All moneys paid or payable to any resident of this state as the insured or beneficiary designated under any insurance policy or policies providing for the payment of life, sick, accident, or disability benefits shall be exempt from liability or seizure under judicial process of any court and shall not be subjected to the payment of any debt by contract or otherwise by any writ, order, judgment, or decree of any court. However, the validity of any sale, assignment, mortgage, pledge, or hypothecation of any policy of insurance, or, if any avails, proceeds, or benefits thereof, shall in no way be affected by the provisions of this section.

History. Acts 1933, No. 102, § 1; Pope's Dig., § 7988; A.S.A. 1947, § 30-208.

Publisher's Notes. This section was

held unconstitutional in *In re Hudspeth*, 92 Bankr. 827 (1988), and *In re Williams*, 93 Bankr. 181 (1988).

RESEARCH REFERENCES

Ark. L. Notes. Laurence, On Worthen, Walker and Dicta: The Supreme Court Shoots the Breeze About Exemption Law, 1993 Ark. L. Notes 73.

Lawrence, What Holt Says and Why It's Wrong: An Essay on Sanders v. Putman, Putman v. Sanders and The Uneasy Condition of Arkansas Exemption Law, 1995 Ark. L. Notes 67.

Ark. L. Rev. Westbrook, Retirement

Plan Assets in an Arkansas Bankruptcy, 43 Ark. L. Rev. 253.

Laurence, In re Holt and the Re-making of Arkansas Exemption Law: Commentary After the Rout, 43 Ark. L. Rev. 235.

UALR L.J. Legislative Survey, Business Law, 4 UALR L.J. 579.

Survey — Bankruptcy, 11 UALR L.J. 127.

Survey, Bankruptcy, 13 UALR L.J. 311.

CASE NOTES

ANALYSIS

Constitutionality.

In general.

Cash surrender proceeds.

Dividends.

Fraud.

Insurance proceeds.

Secured indebtedness.

Time of debt origin.

Veteran's death benefits.

Constitutionality.

This section is constitutional except as

to its retroactive application. It is unconstitutional as applied to a debt owing and reduced to judgment before its enactment. *W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 54 S. Ct. 816, 78 L. Ed. 1344 (1934).

Because of the unmistakable incompatibility with Ark. Const., Art. 9, § 2, this section is unconstitutional and cannot act to exempt property from inclusion in a debtor's estate pursuant to § 16-66-218(b)(7) and 11 U.S.C. § 522(b)(2)(A). In *re Hudspeth*, 92 Bankr. 827 (Bankr. W.D. Ark. 1988).

This section violates Ark. Const., Art. 9, § 2, because, it exempts all insurance proceeds without limitation; the only way to cure the statute's invalidity would be to add a monetary limit consistent with the state constitution or to amend the constitution itself to revise the \$500.00 ceiling. It is not the court's function to rewrite statutes to make them constitutional; therefore, the effect of the court's decision in the *Hudspeth* case is to render any exemption provided by § 16-66-209 unavailable to debtors in bankruptcy. In *re Williams*, 93 Bankr. 181 (Bankr. E.D. Ark. 1988).

This section is unconstitutional as applied to debtors in bankruptcy because it is in direct conflict with the overriding \$500 limitation imposed by Ark. Const., Art. 9, § 2. *Federal Sav. & Loan Ins. Co. v. Holt*, 894 F.2d 1005 (8th Cir. 1990).

In General.

This section exempts "all moneys," not just death benefits. In *re Duckett*, 65 Bankr. 545 (Bankr. W.D. Ark. 1986).

Cash Surrender Proceeds.

Where the life insurance policies contain no investment device or special dividend provision, the cash surrender proceeds of the debtor's policies are a mere incident of the debtor's life insurance policies, and thus are exempt in bankruptcy proceedings. In *re Duckett*, 65 Bankr. 545 (Bankr. W.D. Ark. 1986); In *re Weiler*, 65 Bankr. 564 (Bankr. E.D. Ark. 1986); In *re Johnson*, 66 Bankr. 39 (Bankr. W.D. Ark. 1986), *aff'd*, 85 Bankr. 518 (W.D. Ark. 1987).

The cash surrender values of life insurance policies are exempt from the claims of creditors. *Lee v. Johnson*, 85 Bankr. 518 (W.D. Ark. 1987).

Dividends.

Accumulated dividends invested by in-

surance company in corporate stocks and payable to policyholder at certain times, but not payable to beneficiaries of life policy, were dividends paid to policyholder as an investor, not "as the insured or beneficiary designated under any insurance policy ..." and dividends were not exempt from judicial seizure under this section. *Cluck v. Mack*, 253 Ark. 769, 489 S.W.2d 8 (1973).

Fraud.

The language of this section exempts all debts of whatever nature and in whatsoever manner incurred and is therefore applicable to obligation arising out of the fraudulent conduct of a beneficiary which may be made the basis for a recovery in a proper proceeding. *Ponder v. Jefferson Std. Life Ins. Co.*, 194 Ark. 829, 109 S.W.2d 946 (1937).

Insurance Proceeds.

The bankruptcy exemption for insurance proceeds in this section and § 16-66-218 is limited by Ark. Const., Art. 9, § 2. *Federal Sav. & Loan Ins. Corp. v. Holt*, 97 Bankr. 997 (W.D. Ark. 1988), *aff'd*, 894 F.2d 1005 (8th Cir. 1990).

Secured Indebtedness.

This section does not deal with pledged property and does not exempt proceeds of life policy assigned to secure indebtedness from claim of judgment creditor of assignee. *Hill v. Bush*, 192 Ark. 181, 90 S.W.2d 490 (1936).

Time of Debt Origin.

This section does not impose any limitation as to the time of the origin of the debt and court cannot construe it as exempting from judicial process only debts of the beneficiary for which he was liable before and at the time the insurance policies matured by reason of insured's death. *Ponder v. Jefferson Std. Life Ins. Co.*, 194 Ark. 829, 109 S.W.2d 946 (1937).

Veteran's Death Benefits.

Benefits for death of a service man who had not applied for the insurance, constituted insurance and are exempt from liability for seizure under judicial process for all debts of whatever nature and in whatsoever manner incurred. *Cruce v. Arkansas State Hosp.*, 241 Ark. 680, 409 S.W.2d 342 (1966).

16-66-210. Homestead Exemption Act.

(a) This section shall be known and may be cited as the "Homestead Exemption Act of 1981".

(b) The homestead of any resident of this state who is married or the head of a family shall not be subject to the lien of any judgment, or decree of any court, or to sale under execution or other process thereon, except such as may be rendered for the purchase money or for specific liens, laborers' or mechanics' liens for improving the homestead, or for taxes, or against executors, administrators, guardians, receivers, attorneys for moneys collected by them, and other trustees of an express trust for moneys due from them, in their fiduciary capacity.

(c)(1) The homestead outside any city, town, or village, owned and occupied as a residence, shall consist of no more than one hundred sixty (160) acres of land, with the improvements thereon, to be selected by the owner. The homestead shall not exceed in value the sum of two thousand five hundred dollars (\$2,500), but, in no event shall the homestead be reduced to less than eighty (80) acres, without regard to value.

(2) The homestead in any city, town, or village, owned and occupied as a residence, shall consist of not more than one (1) acre of land, with the improvements thereon, to be selected by the owner. The homestead shall not exceed the sum of two thousand five hundred dollars (\$2,500) in value, but in no event shall the homestead be reduced to less than one-quarter ($\frac{1}{4}$) of an acre of land, without regard to value.

(3) Any homestead outside any city, town, or village, owned and occupied as a residence, which is annexed to or made part of an incorporated city or town within the State of Arkansas, shall retain its exemption under subdivision (c)(1) of this section as long as the land on which it is located remains rural in nature and has a significant agricultural use.

(d) The homestead provided for in this section shall inure to the benefit of the minor children, under the exemptions provided in this section, after the demise of the parents.

History. Acts 1981, No. 663, §§ 1-4, 6; A.S.A. 1947, §§ 30-221 — 30-224, 30-226; Acts 1989, No. 282, § 1.

Cross References. Homestead exemption, Ark. Const., Art. 9, § 3.

Homestead rights of minor children, Ark. Const., Art. 9, § 10.

Rural homestead-acreage and value, Ark. Const., Art. 9, § 4.

Urban homestead-acreage and value, Ark. Const., Art. 9, § 5.

RESEARCH REFERENCES

Ark. L. Rev. Establishment of the Homestead Exemption in Arkansas, 9 Ark. L. Rev. 37.

Mobile Homesteads, and in Particular the Exempt Status of Mobile Homes Lo-

cated on Rented Lots: The Laws of Arkansas, Mississippi, Nebraska, and Utah Compared and the Principle of the Liberal Construction of Exemption Statutes Analyzed, 57 Ark. L. Rev. 221 (2004).

UALR L.J. Legislative Survey, Property, 4 UALR L.J. 607.
Survey, Property, 12 UALR L.J. 659.

CASE NOTES

ANALYSIS

Construction.
Purpose.
Family.
Head of a family.
Proof.

Construction.

Homestead laws are to be liberally construed in favor of the exemption. In re Pate, 95 Bankr. 102 (Bankr. W.D. Ark. 1988).

Purpose.

The purpose behind the homestead exemption is the protection of families from execution of judgments upon their home. In re Pate, 95 Bankr. 102 (Bankr. W.D. Ark. 1988).

Family.

In order to constitute a family, something more is required than a mere aggregation of individuals residing in the same house. In re Pate, 95 Bankr. 102 (Bankr. W.D. Ark. 1988).

The concept of "family" in the exemption imposes the requirement of a substantial relationship between the person who is obligated to provide the support and the person who as a dependent relies upon the support. In re Pate, 95 Bankr. 102 (Bankr. W.D. Ark. 1988).

Head of a Family.

The Arkansas Supreme Court has recognized certain factors that are critical in

the determination as to whether a debtor qualifies as "head of a family." These factors are: (1) the existence of an obligation upon the head of the house to support the others; (2) the existence of a corresponding state of dependence upon those being supported; and (3) the head of the family is one in authority where the status or relationship of the family exists. In re Pate, 95 Bankr. 102 (Bankr. W.D. Ark. 1988).

Debtor was entitled to claim a homestead exemption under 11 U.S.C.S. § 522(b)(2)(A) because she met the elements of head of household under Ark. Const. art. 9, § 3, and this section where (1) although she might not have been legally obligated to support her mother, debtor undertook the obligation, (2) her mother was partially dependent upon the debtor for basic financial needs, and (3) because of the mother's medical condition, the debtor had assumed the decision-making role with regards to household affairs. In re Warnock, 323 B.R. 249 (Bankr. W.D. Ark. 2005).

Proof.

Where debtor failed to prove anything more than a minimal relationship, the fact that he and his father lived in the same house, debtor could not claim his interest in the property under the homestead exemption. In re Pate, 95 Bankr. 102 (Bankr. W.D. Ark. 1988).

Cited: Powell v. First Nat'l Bank, 113 Bankr. 512 (W.D. Ark. 1990).

16-66-211. Claiming exemptions — Schedule of property — Stay of execution — Levy on remainder of property — Appeal.

(a)(1) Whenever any resident of this state, upon the issue against him or her for the collection of any debt by contract of any execution or other process, of any attachment except specific attachment against his or her property, desires to claim any of the exemptions provided for by law, he or she shall prepare a schedule, verified by affidavit, of all his or her property. This schedule shall include moneys, rights, credits, and choses in action held by himself or herself or others for him or her and

specifying the particular property which he or she claims as exempt under the provisions of the Arkansas Constitution, Article 9.

(2) After giving five (5) days' notice in writing to the opposing party or his or her agent or attorney, the resident claiming the exemption shall file the schedule with the judge or clerk issuing the execution or other process or attachment.

(3) A hearing shall be ordered by the court or judge issuing the process if, within five (5) days after receiving the notice required to be given by the person claiming the exemption, the party in whose favor the process issued files a request for a hearing with the judge or clerk of the court.

(4) If after the hearing, either in open court or by the judge in vacation, the claim of exemption is determined to be valid, then supersedeas shall issue, staying any sale or further proceeding under the execution, process, or attachment against the property described in the schedule, and claimed as exempted, and by returning the property to the defendant.

(5) No alias execution shall be levied on property relieved from process by claim of exemption until one (1) year from the date of the filing of the schedule of exemptions.

(b)(1) If the debtor has other property than that claimed in any former schedule, the officer shall levy upon that other property.

(2) If the debtor desires to claim further exemptions, he shall include all his property in any schedule therefor.

(c) If in any such schedule it appears that the debtor has more property in value than is exempt by law, he or she shall select his or her exemptions. The remainder of the property shall be subject to the levy of the execution, whether the property is included in any former schedule or not.

(d) An appeal may be taken to the circuit court from any order of judgment rendered by a justice of the peace upon the filing of the affidavit and upon executing the bond required in other cases of appeal.

History. Acts 1871, No. 58, § 1, p. 285; 1877, No. 53, § 1, p. 53; 1891, No. 3, § 1, p. 2; C. & M. Dig., §§ 5549-5551; Pope's Dig., §§ 7188-7190; Acts 1953, No. 164, § 2, p. 555; 1981, No. 714, § 1; A.S.A. 1947, § 30-209.

A.C.R.C. Notes. Acts 1991, No. 389, § 4, provided: "All portions of Arkansas

Code of 1987 Annotated § 16-66-211 pertaining to claiming exemptions in actions involving Writs of Execution are hereby repealed to the extent that the provision is inconsistent with the provisions of this act. All laws and parts of laws in conflict with this act are hereby repealed."

RESEARCH REFERENCES

Ark. L. Rev. Laurence, An Odd Collection of Topics Relating to Creditors' Remedies Upon Which Various Federal Courts Have Recently Spoken — Rule 69, Rule 13, Federal Tax Liens and the Due Process Rights of Creditors, 37 Ark. L. Rev. 875.

UALR L.J. Survey of Arkansas Law: Business Law, 4 UALR L.J. 161.

Notes, Garnishment Procedures Must Provide For Notice to Postjudgment Debtor, etc., 9 UALR L.J. 517.

CASE NOTES

ANALYSIS

Constitutionality.

In general.

Exemptions.

Hearing.

Noncompliance.

Notice.

Proof.

Schedule.

—Sufficiency of schedule.

Supersedeas.

Constitutionality.

Because the statutes pertaining to postjudgment garnishment, this section, §§ 16-66-208 and 16-110-401, do not require notice to the judgment debtor informing him of the garnishment, notice of possible state and federal exemptions, a prompt hearing to permit the judgment debtor to claim exemptions, an affidavit from the creditor stating that the writ would not cause the attachment of exempt funds, or the posting of a bond to compensate the judgment debtor for injury in case of wrongful garnishment, these sections do not contain sufficient procedural safeguards designed to prevent erroneous seizures to satisfy due process and are unconstitutional as violative of the due process clause of the Fourteenth Amendment of the United States Constitution. *Davis v. Paschall*, 640 F. Supp. 198 (E.D. Ark. 1986).

Postjudgment exemption laws adequately provide for procedures and hearings by which a judgment debtor may exercise his or her rights to exemption claims or the return of levied property. It is the lack of a requirement of notice to the judgment debtor, however, that makes statutory provisions such as §§ 16-66-211 and 16-66-401 constitutionally deficient. *Duhon v. Gravett*, 302 Ark. 358, 790 S.W.2d 155 (1990).

Service on garnishee was invalid due to the invalidity of this section on which it was based, and the constitutional deficiency was not supplied by actual notice to garnishee of items constitutionally required. *Gravett v. Marks*, 304 Ark. 549, 803 S.W.2d 551 (1991).

In General.

Exemption is not allowed unless claimed as provided. *Scanlan v. Guiling*, 63 Ark. 540, 39 S.W. 713 (1897).

The method provided by this section is exclusive of all others. *Baxley v. Laster*, 82 Ark. 236, 101 S.W. 755 (1907).

Every citizen of this state is entitled to exemptions, but in order to get his property exempt he must comply with the law. *Griffin v. Puryear-Meyer Grocery Co.*, 202 Ark. 495, 151 S.W.2d 656 (1941).

To be allowable, exemptions must be claimed in manner provided. *Jennings v. Tankersley Bros. Packing Co.*, 218 Ark. 776, 238 S.W.2d 625 (1951).

Exemptions.

The articles claimed as exempt must be specified. *Friedman v. Sullivan*, 48 Ark. 213, 2 S.W. 785 (1886).

A debtor cannot claim his exemptions out of the proceeds of attached property when he has had an opportunity to schedule the specific property. *Surratt v. Young*, 55 Ark. 447, 18 S.W. 539 (1892).

Where Bulk Sales Law was not complied with, rights of seller's creditors could not be defeated on ground that seller was entitled to exemption when value of property sold, together with all other personal property owned by him, was less than his statutory exemption. *Griffin v. Puryear-Meyer Grocery Co.*, 202 Ark. 495, 151 S.W.2d 656 (1941).

Hearing.

Dismissal of proceedings claiming certain property as exempt from seizure did not preclude a subsequent action to have exemptions set apart. *Taylor v. Tomlinson*, 65 Ark. 232, 45 S.W. 544 (1898).

Noncompliance.

A debtor who neglects to claim his exemptions as provided by this section waives his right to exemption. *Andrews v. Briggs*, 203 Ark. 714, 158 S.W.2d 269 (1942).

A judgment creditor was not prejudiced by a finding that the debtor's homestead was exempt from any levy under an earlier judgment even though the debtor failed to follow the proper procedures in claiming the exemption. *Ross v. White*, 15 Ark. App. 98, 689 S.W.2d 588 (1985).

Notice.

An appearance contesting the right to schedule is a waiver of the five days' notice. *Garrett Bros. v. Wade*, 46 Ark. 493

(1885); *Brown v. Doneghey*, 46 Ark. 497 (1885).

Notice to judgment debtor, to be constitutional, need not supply the judgment debtor with a "laundry list" of statutory or constitutional exemptions or inform him of all available exemptions. Such notice need only inform the debtor that postjudgment execution is being levied and that state and federal exemptions may be available with respect to the property subject to the levy. *Duhon v. Gravett*, 302 Ark. 358, 790 S.W.2d 155 (1990).

Actual notice is insufficient where a notice statute is constitutionally insufficient. *Gravett v. Marks*, 304 Ark. 549, 803 S.W.2d 551 (1991).

Proof.

A judgment debtor who was allowed his rural exemption and who sought to enlarge his exemption had the burden of showing his right thereto. *Hatcher v. Wasson*, 191 Ark. 765, 87 S.W.2d 578 (1935).

A debtor claiming property to be exempt from execution is required to make a schedule of all his property, specifying the particular property claimed as exempt, and file the same with the officer after giving five days' notice in writing to the opposite party; if he would claim exemption for any of the property, he must bring himself and his property within the exceptions of some section by proper proof. *Griffin v. Puryear-Meyer Grocery Co.*, 202 Ark. 495, 151 S.W.2d 656 (1941).

Once the debtor's right to the homestead exemption is at issue, the burden of proof is on the one claiming the exemption. *In re Pate*, 95 Bankr. 102 (Bankr. W.D. Ark. 1988).

Schedule.

The schedule is amendable, on appeal in circuit court. *May v. Hutson*, 54 Ark. 226, 15 S.W. 606 (1891).

Schedule should be filed with justice when process from which property is

claimed exempt is issued by him. *Taylor v. Tomlinson*, 65 Ark. 232, 45 S.W. 544 (1898).

An intentional failure to make a full disclosure of all personal property authorizes a disallowance of the claim. *Farris v. Gross*, 75 Ark. 391, 87 S.W. 633 (1905).

One who claims that his property is exempt from sale must file a written schedule with the justice of the peace who issued the execution before the sale, and mere notice that he intends to claim exemption does not satisfy the statute. *Andrews v. Briggs*, 203 Ark. 714, 158 S.W.2d 269 (1942).

Rule that one claiming exemption from sale must file written schedule with the justice who issued the execution prior to the sale is relaxed if unavoidable casualty intervenes. *Andrews v. Briggs*, 203 Ark. 714, 158 S.W.2d 269 (1942).

Defendant debtor is entitled to amend his schedule of exemption to show actual assets held by him. *Williams v. Swann*, 220 Ark. 906, 251 S.W.2d 111 (1952).

—Sufficiency of Schedule.

Schedule found sufficient. *Huffman v. Thompson*, 64 Ark. 196, 41 S.W. 428 (1897).

Schedule found insufficient. *Cain v. Chennault*, 195 Ark. 141, 110 S.W.2d 1063 (1937).

Supersedeas.

The debtor must see that supersedeas is issued, or he will have waived his right thereto; and if judgment is adverse, he must prosecute an appeal. *Cason v. Bone*, 43 Ark. 17 (1884); *Chambers v. Perry*, 47 Ark. 400, 1 S.W. 700 (1886).

A justice of the peace has no power to revoke a supersedeas. *Cox v. Lee*, 50 Ark. 456, 8 S.W. 400 (1887).

Cited: *Duraclean Co. v. Foltz*, 240 Ark. 38, 397 S.W.2d 804 (1966); *Winkle v. Grand Nat'l Bank*, 267 Ark. 101, 590 S.W.2d 852 (1979); *Stephens v. Walker*, 743 F. Supp. 670 (W.D. Ark. 1990).

16-66-212. Right of homestead not lost by failure to schedule — Wife may claim.

(a) A debtor's right of homestead shall not be lost or forfeited by his or her omission to select and claim it as exempt before the sale thereof on execution, nor by his or her failure to file a description or schedule of the homestead in the recorder's or clerk's office.

(b) The debtor may select and claim his or her homestead after or before its sale on execution and may set up his or her right of homestead when suit is brought against him or her for possession.

(c) If a spouse neglects or refuses to make such claim, his or her spouse may intervene and set it up.

(d) If the debtor does not reside on his or her homestead and is the owner of more land than he or she is entitled to hold as a homestead, the debtor or his or her spouse, as the case may be, shall select the homestead before sale.

History. Acts 1887, No. 64, § 2, p. 90; C. & M. Dig., § 5543; Pope's Dig., § 7182; A.S.A. 1947, § 30-210.

RESEARCH REFERENCES

Ark. L. Rev. Establishment of the Homestead Exemption in Arkansas, 9 Ark. L. Rev. 37.

CASE NOTES

ANALYSIS

In general.
Burden of proof.
Children.
Levy.
Personal right.
Suit for possession.
Waiver of right.
Wife's claim.

In General.

This section does not change the nature of the homestead estate, only the right is not lost by a failure to file schedule. *Snider v. Martin*, 55 Ark. 139, 17 S.W. 712 (1891); *Tillar v. Bass*, 57 Ark. 179, 21 S.W. 34 (1893). See *Brignardello v. Cooper*, 116 Ark. 103, 172 S.W. 1030 (1915).

A right of homestead is not lost by failure to file a schedule claiming it before sale under execution or undue decree of chancery. *Isbell v. Jones*, 75 Ark. 591, 88 S.W. 593 (1905); *Massengale v. Massengale*, 186 Ark. 917, 56 S.W.2d 763 (1933).

The sale of a homestead can convey title free of a judgment lien in existence at the time of the sale, and it is well established that as to a homestead there are no creditors, once the property is occupied as a homestead nothing more need be done to give the debtor the right to claim the personal privilege against a judgment

creditor's sale. *Arkansas Sav. & Loan Ass'n v. Hayes*, 276 Ark. 582, 637 S.W.2d 592 (1982).

Burden of Proof.

The judgment debtor may wait until suit is brought before asserting homestead exemption; however, once putting the debtor's homestead right at issue, the burden of proof is on the one claiming the right to the exemption. *Arkansas Sav. & Loan Ass'n v. Hayes*, 276 Ark. 582, 637 S.W.2d 592 (1982).

Children.

Widow's conduct with reference to homestead cannot affect rights of minor children. *Russell v. Suddoth*, 123 Ark. 200, 184 S.W. 842 (1916).

Levy.

Sheriff was not excused from executing on property because it was homestead. *State v. Sheriff of Lafayette County*, 292 Ark. 523, 731 S.W.2d 207 (1987).

Personal Right.

Subsequent purchasers and mortgagees cannot claim a judgment debtor's right to the homestead exemption in the property because it is a personal right which must be exercised by the party who seeks its benefits. *Arkansas Sav. & Loan Ass'n v. Hayes*, 276 Ark. 582, 637 S.W.2d 592 (1982).

Suit for Possession.

The failure of a homestead claimant to assert his claim of exemption before it was sold under execution or to file a schedule thereof does not work a forfeiture of the homestead right which may be asserted when suit for possession is brought. *Dean v. Cole*, 141 Ark. 177, 216 S.W. 308 (1919).

Debtor may wait and set up homestead in land sold under execution until demand for possession. *McKee v. Waters*, 166 Ark. 301, 265 S.W. 947 (1924).

Following execution sale of property constituting a homestead, homestead right may be asserted when suit is brought for possession by the purchaser at the sale. *White v. Turner*, 203 Ark. 95, 155 S.W.2d 714 (1941).

Where debtor's homestead was purchased by judgment creditor who mortgaged it to a bank, foreclosure suit by the bank was held an attempt to sell a homestead in satisfaction of a judgment rendered upon a contract even though no claim of homestead was made until after the execution sale since claim may be asserted at any time when it is sought to dispossess the owner of the homestead. *Bank v. White*, 205 Ark. 852, 171 S.W.2d 55 (1943).

Waiver of Right.

The homestead right is still a privilege and may be waived by nonassertion, and a sale under execution is valid to all the world except to the husband and wife; as

to them, the purchaser takes a defeasible title. *Snider v. Martin*, 55 Ark. 139, 17 S.W. 712 (1891); *Jones v. Dillard*, 70 Ark. 69, 66 S.W. 202 (1902).

Realty is exempt from sale under the homestead laws from creditors of either husband or wife and it does not matter that husband against whom creditor sought to collect judgment did not claim the homestead exemption. *Campbell v. Geheb*, 258 Ark. 225, 523 S.W.2d 185 (1975).

Wife's Claim.

Wife can claim homestead when husband neglects or refuses to do so. *Hollis v. State*, 59 Ark. 211, 27 S.W. 73 (1894).

The sale of a homestead by a husband and wife conveyed title free of a judgment lien which existed at the time of the sale against the husband debtor, even though the husband did not seek to exercise his right against execution. *Arkansas Sav. & Loan Ass'n v. Hayes*, 276 Ark. 582, 637 S.W.2d 592 (1982).

Upon their divorce, husband and wife became tenants in common, each possessing an undivided, one-half interest in the property, and wife could not continue to assert husband's homestead interest after the divorce unless the right to do so was reserved in the divorce decree. *Blackford v. Dickey*, 302 Ark. 261, 789 S.W.2d 445 (1990).

Cited: *Rowe v. Gose*, 240 Ark. 722, 401 S.W.2d 745 (1966).

16-66-213. Appraisal of property claimed as exempt.

(a) Upon application to the justice or clerk by the plaintiff in whose favor such execution, process, or attachment shall have been issued, the justice or clerk, as the case may be, shall forthwith appoint three (3) disinterested appraisers, to be summoned and sworn by the officer levying the attachment, execution, or process.

(b)(1) The appraisers shall proceed at once to appraise the property claimed as exempt.

(2) The appraisal signed by a majority of the appraisers shall be returned with the writ.

(c)(1) If a majority of the appraisers decides that the full amount of the property described and claimed as exempted in the schedule is within the limit of valuation prescribed by the Constitution, then the officer levying the attachment or execution or enforcing other process, shall surrender the property to the defendant. The costs of the proceeding shall be paid by the plaintiff making application for the appraisal.

(2) If the decision shall be that the property described exceeds in value the amount exempted by the Constitution, then the justice or the clerk shall revoke the supersedeas so far as concerns such items of the property described as the appraisers may designate as in excess of the amount of exemption provided for by the Constitution, and the costs of the proceeding shall be paid by the defendant in the action.

(d) Either party shall have the right to appeal from the decision of the board of appraisers provided for in this section. If the board has been appointed by a justice of the peace, then the appeal shall be made to the circuit court of the county upon presentation of a duly certified transcript of the attachment, execution, or other process issued and of the decision of the appraisers. If the board has been appointed by the clerk of a court, then the appeal shall be made to the court by whose clerk the board was appointed.

(e) The appraisers shall each receive as compensation for their services the sum of three dollars (\$3.00) per day for each day's service rendered, not to exceed two (2) days. This amount is to be taxed in the costs of the proceeding.

History. Acts 1871, No. 58, §§ 1, 2, 4, §§ 7191-7194, 7197; A.S.A. 1947, §§ 30-p. 285; 1877, No. 53, §§ 2-4, p. 53; C. & M. 211 — 30-214, 30-216. Dig., §§ 5552-5555, 5558; Pope's Dig.,

CASE NOTES

Construction.

Subdivision (c)(2) should be liberally

construed. *Pemberton v. Bank*, 173 Ark. 949, 294 S.W. 64 (1927).

16-66-214. Effect of filing schedule — Sale stayed without bond — Penalty for sale of scheduled property.

(a) When the schedule provided for in § 16-66-211 has been filed as prescribed in that section, the provisions of Chapter VI, of Title XV of the Code of Civil Practice shall not be considered as applying to the case of the execution or other final process stayed.

(b)(1) No indemnifying bond shall be received by the officer levying the execution or enforcing the final process.

(2) If any officer, under the pretext of having received an indemnifying bond, undertakes to sell the property described in the schedule, he or she shall be deemed guilty of gross misdemeanor and shall, upon conviction, be imprisoned in the county jail for a term of not less than one (1) month nor to exceed two (2) months and shall be fined in a sum not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500). He or she shall furthermore be liable upon his official bond to the defendant in twice the amount of damages incurred by the defendant.

History. Acts 1871, No. 58, § 3, p. 285; C. & M. Dig., §§ 5556, 5557; Pope's Dig., §§ 7195, 7196; A.S.A. 1947, § 30-215.

Publisher's Notes. Chapter VI of Title XV of the Code of Civil Practice, referred to in this section, means §§ 723-

741 of the Code of Practice in Civil Cases of 1869. See parallel reference tables in the tables volume.

16-66-215. Evasion of exemption law in collection of debt — Penalty.

Whoever, whether principal, agent, or attorney, under the statutes of this state on the subject of the exemption of property from levy and sale on execution, or in attachment or garnishment, with intent to deprive any resident of this state of his or her rights, sends or causes to be sent out of this state any claim for debt to be collected by proceeding in attachment, garnishment, or other mesne process when the creditor, debtor, person, and corporation owing for the earnings intended to be reached by such proceedings is each within the jurisdiction of the courts of this state shall be guilty of a violation and upon conviction shall be fined for each and every claim so sent out of this state in any sum not less than ten dollars (\$10.00) nor more than fifty dollars (\$50.00).

History. Acts 1909, No. 34, § 1, p. 77; C. & M. Dig., § 5547; Pope's Dig., § 7186; A.S.A. 1947, § 30-217; Acts 2005, No. 1994, § 83. **Amendments.** The 2005 amendment substituted "violation" for "misdemeanor."

16-66-216. Assignment or transfer of debt — Penalty for evasion.

Whoever, either directly or indirectly, assigns or transfers any claims for debts against a citizen of this state for the purpose of having the claims for debts collected by proceedings in attachment, garnishment, or other process out of the wages or personal earnings of the debtor in courts outside of this state when the creditor, debtor, person, or corporation owing the money intended to be reached by the proceedings in attachment is each within the jurisdiction of the courts of this state shall be guilty of a violation and upon conviction shall be fined in any sum not less than ten dollars (\$10.00) nor more than fifty dollars (\$50.00).

History. Acts 1909, No. 34, § 2, p. 77; C. & M. Dig., § 5548; Pope's Dig., § 7187; A.S.A. 1947, § 30-218; Acts 2005, No. 1994, § 83. **Amendments.** The 2005 amendment substituted "violation" for "misdemeanor."

16-66-217. Election of bankruptcy exemptions.

Residents of this state having the right to claim exemptions in a bankruptcy proceeding pursuant to 11 U.S.C. § 522 shall have the right to elect either:

- (i) The property exemptions provided by the Constitution and the laws of the State of Arkansas; or
- (ii) The property exemptions provided by 11 U.S.C. § 522(d).

History. Acts 1991, No. 345, § 2.

RESEARCH REFERENCES

Ark. L. Rev. Mobile Homesteads, and in Particular the Exempt Status of Mobile Homes Located on Rented Lots: The Laws of Arkansas, Mississippi, Nebraska, and Utah Compared and the Principle of the Liberal Construction of Exemption Statutes Analyzed, 57 Ark. L. Rev. 221 (2004).

UALR L.J. Legislative Survey, Business Law, 4 UALR L.J. 579.

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Hardin, Conversion of Nonexempt Property to Exempt Property on the Eve of Bankruptcy in Arkansas, 10 UALR L.J. 719.

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Survey, Bankruptcy, 13 UALR L.J. 311.

Survey — Debtor/Creditor Relations, 14 UALR L.J. 767.

CASE NOTES

ANALYSIS

Exemptions prior to effect of section.
Federal exemptions.
Homestead.
Retroactivity.

Exemptions Prior to Effect of Section.

A debtor may exempt any property that is exempt under federal, state, or local law on the date of the filing of the bankruptcy petition. Therefore, the debtors were entitled to use the federal bankruptcy exemptions where they filed their petition prior to June 17, 1981, even though they filed modifications of that plan after that date. *Hollytex Carpet Mills v. Tedford*, 24 Bankr. 197 (Bankr. W.D. Ark.)

Federal Exemptions.

This section does not adopt the federal exemption table listed in 11 U.S.C. § 522(d)(1), but rather adheres to it. In re *Criswell*, 152 Bankr. 264 (Bankr. E.D. Ark. 1992).

When enacting this section, the legislature intended to give the citizens of the State of Arkansas an opportunity to enjoy the rights granted by the federal government; the legislature did not adopt the federal exemptions, but merely provided bankruptcy debtors the opportunity to choose the federal exemptions. In re *Criswell*, 152 Bankr. 264 (Bankr. E.D. Ark. 1992).

Judgment creditor's judicial lien could have been avoided by debtors under 11 U.S.C.S. § 522(f) where (1) pursuant to § 16-66-112, the creditor held a judicial lien on debtors' vehicle upon delivery of its

writ of execution, (2) debtors claimed an exemption of \$ 2,400 for the vehicle under 11 U.S.C.S. § 522(d)(2), and (3) because debtors elected to exempt their vehicle under the bankruptcy code, which allowed an exemption of up to \$2,775 for an automobile, the judicial lien held by the creditor on the vehicle impaired debtors' allowable exemption under § 522(b). In re *Huffman*, — Bankr. —, 2002 Bankr. LEXIS 1845 (Bankr. E.D. Ark. June 20, 2002).

Homestead.

There was no dispute that the debtor possessed a homestead within the meaning of Ark. Const., Art. 9, § 3 when at the time he resided in the property he was the head of a household, an Arkansas resident, and made the dwelling "home." In re *Gerrald*, 151 Bankr. 217 (Bankr. W.D. Ark. 1993).

Once the right of homestead is acquired and the property remains occupied by the owner, the homestead is not lost by the death of a spouse, departure of dependent children from the home, or divorce of the parties; however, the presumption in favor of homestead can be overcome upon a clear showing of abandonment. In re *Gerrald*, 151 Bankr. 217 (Bankr. W.D. Ark. 1993).

A temporary removal, even for a period of several years, does not constitute an abandonment. In re *Gerrald*, 151 Bankr. 217 (Bankr. W.D. Ark. 1993).

Because separating the real property, which was the subject of the debtors' claim of a homestead exemption under 11

U.S.C.S. § 522(b)(2), this section, and Ark. Const. Art. 9, § 5, into exempt and non-exempt parcels would be an unlawful subdivision, the bankruptcy court ordered a sale of the property and the allocation of the proceeds between the trustee and the debtors according to each parties' interest. *In re Bradley*, 282 Bankr. 430 (Bankr. W.D. Ark. 2002).

Where the debtor elected bankruptcy exemptions under state law rather than 11 U.S.C.S. § 522, the court found that the debtor's claimed interest was abandoned by the debtor; the property was no longer impressed with homestead charac-

ter sufficient to allow the debtor to claim a right to homestead exemption in the property pursuant to this section and § 16-66-218. *In re Hunter*, 295 B.R. 882 (Bankr. W.D. Ark. 2003).

Retroactivity.

In enacting Acts 1991, No. 345, the general assembly did not intend the election of either state or federal exemptions to be given retroactive effect. *In re Gardner*, 139 Bankr. 460 (Bankr. E.D. Ark. 1991).

Cited: *Gerrald v. Wright*, 57 F.3d 652 (8th Cir. 1995).

16-66-218. Exemptions from execution under federal bankruptcy proceedings.

(a) The following property shall be exempt from execution under bankruptcy proceedings pursuant to Pub. L. No. 95-598:

(1) The unmarried debtor's aggregate interest, not exceeding eight hundred dollars (\$800) in value, and the married debtor's aggregate interest, not exceeding one thousand two hundred fifty dollars (\$1,250) in value, in real or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor;

(2) The debtor's interest, not to exceed one thousand two hundred dollars (\$1,200) in one (1) motor vehicle;

(3) The debtor's aggregate interest in the debtor's or the debtor's spouse's wedding bands, including diamonds mounted thereon not exceeding one-half (½) carat in weight;

(4) The debtor's aggregate interest, not to exceed seven hundred fifty dollars (\$750) in value in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(b) The exemptions granted in subsection (a) of this section shall be in addition to the present exemptions granted by Arkansas law as listed below:

(1) The personal property of an unmarried person not the head of a family not exceeding a value of two hundred dollars (\$200) in addition to such person's wearing apparel — Arkansas Constitution, Article 9, Section 1;

(2) The personal property of a married person or head of a family not exceeding a value of five hundred dollars (\$500) in addition to such person's wearing apparel — Arkansas Constitution, Article 9, § 2;

(3) Rural homesteads not exceeding one hundred sixty (160) acres of land with improvements thereon, up to two thousand five hundred dollars (\$2,500) in value but in no event less than eighty (80) acres without regard to value — Arkansas Constitution, Article 9, § 4;

(4) The urban homestead not exceeding one (1) acre of land with improvements thereon, but not to exceed two thousand five hundred

dollars (\$2,500) in value, but in no event to be less than one-quarter ($\frac{1}{4}$) of an acre of land without regard to value — Arkansas Constitution, Article 9, § 5;

(5) The rural or urban homestead of a widow or surviving dependent children including the rents and profits from such homestead — Arkansas Constitution, Article 9, § 6;

(6) Sixty (60) days' wages, not exceeding the limits imposed by the Arkansas Constitution, Article 9, §§ 1 and 2, but in no instance less than twenty-five dollars (\$25.00) per week — § 16-66-208;

(7) Proceeds of life, health, accident, and disability insurance — § 16-66-209;

(8) Department of Arkansas State Police retirement benefits — §§ 24-6-202, 24-6-205, 24-6-223;

(9) Stipulated premium insurance benefits — § 23-71-112;

(10) Mutual assessment insurance benefits — § 23-72-114;

(11) Fraternal benefit society benefits — § 23-74-119 [repealed];

(12) Assets of delinquent insurer — § 23-68-120;

(13) Rights to unemployment benefits and benefits received but not mingled with other funds except for debts incurred for necessities furnished during the time of unemployment — §§ 11-10-107 — 11-10-110;

(14) Workers' compensation benefits — § 11-9-110;

(15) Public welfare assistance grants — § 20-76-430;

(16) All contributions made by a debtor to an individual retirement account, as that term is defined for federal income tax purposes and state income tax purposes, for a period exceeding one (1) year prior to the filing of a petition of bankruptcy. However, the maximum amount of individual retirement account contributions that may be claimed under this subdivision shall not exceed twenty thousand dollars (\$20,000) for an individual and twenty thousand dollars (\$20,000) for a husband and wife combined; and

(17) All other benefits exempt by law but not specifically enumerated herein.

History. Acts 1981, No. 419, § 2; A.S.A. 1947, § 36-211; Acts 1987, No. 932, § 1; 1989, No. 821, § 5.

Publisher's Notes. Section 23-74-119, concerning fraternal benefit society benefits, was repealed by Acts 1989, No. 881,

effective January 1, 1990. For present law, see title 23, chapter 74, subchapter 4.

U.S. Code. Public Law 95-598 referred to in this section is codified primarily throughout Titles 11 and 28 of the United States Code.

RESEARCH REFERENCES

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Hardin, Conversion of Nonexempt

Property to Exempt Property on the Eve of Bankruptcy in Arkansas, 10 UALR L.J. 719.

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CASE NOTES

ANALYSIS

Constitutionality.

Abandonment.

Family.

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Worker's compensation benefits.

Constitutionality.

Because of the unmistakable incompatibility with Ark. Const., Art. 9, § 2, § 16-66-209 is unconstitutional and cannot act to exempt property from inclusion in a debtor's estate pursuant to subdivision (b)(7) of this section and 11 U.S.C. § 522(b)(2)(A). In re Hudspeth, 92 Bankr. 827 (Bankr. W.D. Ark. 1988).

Subdivisions (a)(2)-(4) and (b)(16) violate the state constitution because they provide for exemptions which exceed the \$500.00 limitation provided for by the Arkansas Constitution, therefore, the exemptions provided are unavailable to debtors in bankruptcy. In re Giller, 127 Bankr. 215 (Bankr. W.D. Ark. 1990).

Abandonment.

Evidence supported conclusion that debtors intended to abandon portion of homestead on which buildings were situated by devoting that area to manufacture of new and refurbished buses where debtors did not construct buildings for any family or domestic purpose, buildings were constructed to conduct a manufacturing business, and buildings were permanent in nature and intended for industrial purposes. In re Evans, 190 Bankr. 1015 (Bankr. E.D. Ark. 1995), *aff'd* without op. sub nom. Evans v. Worthen Nat'l Bank, 108 F.3d 1381 (8th Cir. 1997).

Family.

In order to constitute a family, some-

thing more is required than a mere aggregation of individuals residing in the same house. In re Pate, 95 Bankr. 102 (Bankr. W.D. Ark. 1988).

The concept of "family" in the exemption imposes the requirement of a substantial relationship between the person who is obligated to provide the support and the person who as a dependent relies upon the support. In re Pate, 95 Bankr. 102 (Bankr. W.D. Ark. 1988).

Head of a Family.

The Arkansas Supreme Court has recognized certain factors that are critical in the determination as to whether a debtor qualifies as "head of a family." These factors are: (1) the existence of an obligation upon the head of the house to support the others; (2) the existence of a corresponding state of dependence upon those being supported; and (3) the head of the family is one in authority where the status or relationship of the family exists. In re Pate, 95 Bankr. 102 (Bankr. W.D. Ark. 1988).

Homestead Exemption.

Husband and wife who were joint petitioners in bankruptcy were entitled to only one homestead exemption. Stevens v. Pike County Bank, 829 F.2d 693 (8th Cir. 1987).

Where the homestead property was urban property and exceeded \$2,500.00 in value, the one-acre exemption claimed by the debtor exceeded the exemption allowable under Ark. Const., Art. 9, § 5 and the debtor had to select which portion of the one-acre tract he desired to claim as exempt. In re Giller, 127 Bankr. 215 (Bankr. W.D. Ark. 1990).

Where the debtor elected bankruptcy exemptions under state law rather than 11 U.S.C.S. § 522, the court found that the debtor's claimed interest was abandoned by the debtor; the property was no longer impressed with homestead charac-

ter sufficient to allow the debtor to claim a right to homestead exemption in the property pursuant to § 16-66-217 and this section. In re Hunter, 295 B.R. 882 (Bankr. W.D. Ark. 2003).

Insurance Proceeds.

The bankruptcy exemption for insurance proceeds in this section and § 16-66-209 is limited by Ark. Const., Art. 9, § 2. Federal Sav. & Loan Ins. Corp. v. Holt, 97 Bankr. 997 (W.D. Ark. 1988), *aff'd*, 894 F.2d 1005 (8th Cir. 1990).

Where life insurance policies contain no investment device or special dividend provision, the cash surrender proceeds of the debtor's policies are a mere incident of the debtor's life insurance policies, and, thus are exempt from bankruptcy proceedings based upon § 16-66-209. In re Duckett, 65 Bankr. 545 (Bankr. W.D. Ark. 1986); In re Weiler, 65 Bankr. 564 (Bankr. E.D. Ark. 1986); In re Johnson, 66 Bankr. 39 (Bankr. W.D. Ark. 1986), *aff'd*, 85 Bankr. 518 (W.D. Ark. 1987).

Personal Property Exemption.

Bankruptcy court found that, where the debtor filed his bankruptcy petition as a single person and testified that he was not married when he filed his bankruptcy petition, the debtor was not entitled to the personal property exemption found in the Ark. Const. art. 9, § 2. In re Hunter, 295 B.R. 882 (Bankr. W.D. Ark. 2003).

Proof.

Where debtor failed to prove anything more than a minimal relationship, the fact that he and his father lived in the same house, debtor could not claim his interest in the property under the homestead exemption. In re Pate, 95 Bankr. 102 (Bankr. W.D. Ark. 1988).

Rural Property.

Lots located within a subdivision, which were not within an incorporated town, city or village, and the subdivision was not provided services commonly thought of as being provided in a city, town or village were considered rural property within the meaning of the Arkansas Constitution for exemption purposes. In re Weaver, 128 Bankr. 224 (Bankr. W.D. Ark. 1991).

Woodlands area, a landed property about and contiguous to debtors' dwelling, located in rural area was part of debtors' homestead. In re McCall, 195 Bankr. 911 (Bankr. E.D. Ark. 1995).

Although woodlands were not used for agricultural purposes they were part of debtors' rural homestead where debtors treated woodlands lot as part of their rural homestead, it was assessed together with dwelling, and when obtaining a home improvement loan, they offered it as security. In re McCall, 195 Bankr. 911 (Bankr. E.D. Ark. 1995).

Urban Property.

Facts supported finding that debtors' homestead was urban in nature where property was only six to eight feet from city limits and debtors' property enjoyed all modern conveniences that were enjoyed by residents of city. In re Evans, 190 Bankr. 1015 (Bankr. E.D. Ark. 1995), *aff'd* without op. sub nom. Evans v. Worthen Nat'l Bank, 108 F.3d 1381 (8th Cir. 1997).

Rural/urban issue is not altogether controlled by the corporate limits, thus property located outside the corporate limits may be determined urban. In re Oldner, 191 Bankr. 146 (Bankr. E.D. Ark. 1995).

Facts supported a finding that property was urban in nature where property was located in a megalopolitan area that had developed on either side of interstate between two cities, it was not easy to discern when you left one municipal corporate limit and entered another one, and land uses ranged from single family residences to commercial and industrial uses. In re Oldner, 191 Bankr. 146 (Bankr. E.D. Ark. 1995).

Worker's Compensation Benefits.

Worker's compensation proceeds continue to be exempt from claims of creditors after the money has been paid the injured worker; any other interpretation would defeat the purpose of the exemption, denying the worker the use of his money. In re Covey, 36 Bankr. 696 (Bankr. W.D. Ark. 1984).

Worker's compensation benefits which were received by the debtor prior to the filing of his petition for relief under Chapter 13 of the Bankruptcy Code and were segregated from other assets were exempt from payment to unsecured creditors. In re Covey, 36 Bankr. 696 (Bankr. W.D. Ark. 1984).

Cited: Hollytex Carpet Mills v. Tedford, 24 Bankr. 197 (Bankr. W.D. Ark.); Federal Sav. & Loan Ins. Co. v. Holt, 894 F.2d 1005 (8th Cir. 1990); In re Lillard, 38 Bankr.

433 (Bankr. W.D. Ark. 1984); *In re Bradley*, 282 Bankr. 430 (Bankr. W.D. Ark. 2002).

16-66-219. Wedding rings exempt.

A person's wedding ring shall be exempt from attachment, execution, and seizure for satisfaction of debts.

History. Acts 1989, No. 428, § 1.

Publisher's Notes. Acts 1989, No. 428, § 3, provided that the exemptions provided for in this section shall be in addition to any other exemptions provided by law.

Acts 1989, No. 428, § 4, provided: "The exemptions prescribed by this act do not apply to property that is, as of the effective date of this act, subject to a voluntary

bankruptcy proceeding or to valid claims of a holder of a final judgment who has, by levy, garnishment, or other legal process, obtained rights superior to those that otherwise would be held by a trustee in bankruptcy if a bankruptcy petition were then pending against the debtor."

Cross References. Attachment and garnishment generally, § 16-110-101 et seq.

16-66-220. Pension and profit-sharing plans.

(a)(1) A person's right to the assets held in or to receive payments, whether vested or not, under a pension, profit-sharing, or similar plan or contract, including a retirement plan for self-employed individuals, or under an individual retirement account or an individual retirement annuity, including a simplified employee pension plan, is exempt from attachment, execution, and seizure for the satisfaction of debts unless the plan, contract, or account does not qualify under the applicable provisions of the Internal Revenue Code of 1986.

(2) A person's right to the assets held in or to receive payments, whether vested or not, under a government or church plan or contract is also exempt unless the plan or contract does not qualify under the definition of a government or church plan under the applicable provisions of the federal Employee Retirement Income Security Act of 1974.

(b)(1) Contributions to an individual retirement account that exceed the amounts deductible under the applicable provisions of the Internal Revenue Code of 1986 and any accrued earnings on such contributions are not exempt under this section unless otherwise exempt by law.

(2) However, the limitations of subdivision (b)(1) of this section do not apply to an individual retirement account established pursuant to and qualifying under § 408(A) of the Internal Revenue Code of 1986.

History. Acts 1989, No. 428, § 2; 1999, No. 867, § 1.

Publisher's Notes. Acts 1989, No. 428, § 3, provided that the exemptions provided for in this section shall be in addition to any other exemptions provided by law.

Acts 1989, No. 428, § 4, provided: "The exemptions prescribed by this act do not apply to property that is, as of the effective

date of this act, subject to a voluntary bankruptcy proceeding or to valid claims of a holder of a final judgment who has, by levy, garnishment, or other legal process, obtained rights superior to those that otherwise would be held by a trustee in bankruptcy if a bankruptcy petition were then pending against the debtor."

U.S. Code. The Internal Revenue Code of 1986, referred to in this section, is

codified as 26 U.S.C. § 1 et seq. The federal Employee Retirement Income Security Act of 1974 is codified as 29 U.S.C. § 1001 et seq.

Section 408(A) of the Internal Revenue Code of 1986, referred to in (b)(2), is codified as 26 U.S.C. § 408(a).

16-66-221. Schedule of property — Filing.

(a) Whenever any resident of this state has any final judgment order of a court of record entered against him or her, he or she shall prepare a schedule, verified by affidavit, of all his or her property, both real and personal, including moneys, bank accounts, rights, credits, and choses in action held by himself or herself or others for him or her and specify the particular property which he or she claims as exempt under the provisions of the law.

(b) The schedule shall be filed with the clerk of the court in which the final judgment order was rendered within forty-five (45) days of entry of the final judgment order.

(c) All final judgment orders of a court of record in this state shall include a provision requiring the judgment debtor to comply with the requirements of this section. However, the absence of the provision from a final judgment shall not invalidate the judgment.

History. Acts 1991, No. 610, §§ 1, 2; 1993, No. 120, § 1.

RESEARCH REFERENCES

UALR L.J. Survey — Debtor/Creditor Relations, 14 UALR L.J. 767.

CASE NOTES

Cited: D. Hawkins, Inc. v. Schumacher, 322 Ark. 437, 909 S.W.2d 640 (1995).

SUBCHAPTER 3 — STAYING, QUASHING, OR VACATING WRIT

SECTION.

16-66-301. Petition to judge, to stay, quash, or set aside execution — Proceedings.

16-66-302. Stay not allowed in specified instances.

SECTION.

16-66-303. Stay of execution — Bonds.

16-66-304. Sale of personal property suspended upon giving bond.

16-66-305. Waiver of right of stay.

Cross References. Stay of execution in justice of the peace courts, § 16-19-901 et seq.

Effective Dates. Acts 1889, No. 66, § 4: effective on passage.

RESEARCH REFERENCES

Am. Jur. 30 Am. Jur. 2d, Exec., § 607 **C.J.S.** 33 C.J.S., Exec., § 139 et seq.
et seq.

16-66-301. Petition to judge, to stay, quash, or set aside execution — Proceedings.

(a) If any person against whom any execution has been issued applies to the judge of the court out of which the execution or order of sale was issued, by petition verified by affidavit, setting forth good cause why the execution ought to be stayed, set aside, or quashed, reasonable notice of the intended application having been previously given to the adverse party or his or her agent or attorney of record, the judge shall, upon the application, hear the complaint.

(b)(1) If it appears that the execution ought to be stayed, set aside, or quashed and the petitioner enters into a recognizance with sufficient security in such sum as may be reasonable to be taken and approved by the judge, conditioned that if the application is determined against the petitioner, he or she will pay the debt, damages, and costs, to be recovered by the execution or order of sale, surrender in execution his or her property liable to be seized, taken, and sold by the execution or order of sale, or that the sureties will do it for him or her, then the judge shall make an order for the stay of the execution or order of sale as aforesaid.

(2) However, all property real and personal bound by the execution or order of sale shall remain bound as if no such stay had been granted.

(c) On the presentation of a certified copy of the order to the officer having charge of the execution or order of sale, he or she shall immediately return the execution or order of sale without further action.

(d) The judge shall return the petition and proceedings thereon, duly certified, to the court out of which the execution was issued or the order of sale made returnable. The clerk of that court shall enter the petition and proceedings upon the docket, and the court shall hear and determine the petition and proceedings in a summary manner, according to right and justice, and may award a perpetual stay of or quash the execution or order of sale, or may order the execution or order of sale to be enforced.

History. Rev. Stat., ch. 60, §§ 70-72; C. §§ 5303-5305; A.S.A. 1947, §§ 30-311 — & M. Dig., §§ 4291-4293; Pope's Dig., 30-313.

CASE NOTES

ANALYSIS

Applicability.
Bond.
Defenses.

Noncompliance.
Void judgment.

Applicability.

This section did not apply where the

court did not quash execution until after it had heard the testimony and set the judgment aside. *Harris v. Starr*, 226 Ark. 127, 288 S.W.2d 332 (1956).

The statutory procedure or method of staying or vacating writs of execution on judgments, while apparently exclusive, does not preclude a person from seeking recovery for damages when, pursuant to a writ of execution, a sheriff intentionally or willfully takes property from persons who are in no way connected with the suit and judgment from which the execution ensued. *Battle v. Harris*, 298 Ark. 241, 766 S.W.2d 431 (1989).

Bond.

Although the bond failed to mention that payment under the bond was in any way conditional, the bond was read to include the condition. *Hemingway v. Glasper*, 291 Ark. 172, 722 S.W.2d 866 (1987).

Defenses.

Execution on a judgment rendered without notice will not be quashed unless defendant has a defense to the cause of

action. *Flowers v. United States Guar. Co.*, 89 Ark. 506, 117 S.W. 547 (1909).

Before a party would be entitled to have an execution quashed on ground default judgment was obtained without service of process, it is necessary first to show a valid defense to the action. *Davis v. Bank of Atkins*, 205 Ark. 144, 167 S.W.2d 876 (1943).

Noncompliance.

A judgment creditor was not prejudiced by a finding that the debtor's homestead was exempt from any levy under an earlier judgment even though the debtor failed to follow the proper procedures in claiming the exemption or in obtaining a stay of execution. *Ross v. White*, 15 Ark. App. 98, 689 S.W.2d 588 (1985).

Void Judgment.

Executions on void judgment may be quashed. *Metcalf v. St. Louis, I.M. & S. Ry.*, 101 Ark. 193, 141 S.W. 1167 (1911).

Cited: *Duhon v. Gravett*, 302 Ark. 358, 790 S.W.2d 155 (1990); *Stephens v. Walker*, 743 F. Supp. 670 (W.D. Ark. 1990).

16-66-302. Stay not allowed in specified instances.

(a) No stay shall be allowed upon:

(1) A judgment or decree against any collecting officer, attorney at law, or agent for a delinquency or default in executing or fulfilling the duties of his or her office or place, or failing to pay over money collected by him or her in such capacity, or against a principal by his or her surety, or of a debt due by obligation having the force of a judgment, or of a judgment or decree for specific property, or for the property or its value; or

(2) A judgment or decree enforcing a lien in favor of a vendor or mortgagee; or

(3) A judgment for personal injury or injuries resulting in death caused by neglect or default of another.

(b) In the cases mentioned in this section in which a stay is not allowed, the execution shall be so endorsed by the clerk.

History. Civil Code, § 679; Acts 1909, No. 202, § 1, p. 590; C. & M. Dig., § 4297;

Pope's Dig., § 5309; A.S.A. 1947, § 30-304.

CASE NOTES

ANALYSIS

Bodily harm.
Guardian and ward.

action for injuries resulting in death.
Fernwood Mining Co. v. Pluna, 138 Ark.
459, 213 S.W. 397 (1919).

Guardian and Ward.**Bodily Harm.**

A stay may not be had in an action for
bodily harm not resulting in death, or in

A judgment against a guardian in favor
of his ward may be stayed. Parker v.
Wilson, 99 Ark. 344, 137 S.W. 926 (1911).

16-66-303. Stay of execution — Bonds.

(a) The defendants, except in cases otherwise provided for in this subchapter, when there is no execution thereon in the hands of a collecting officer, may stay any judgment or decree for money for six (6) months by giving, before the clerk of the court entering up the judgment or decree, an obligation with good surety, to be approved by the officer, in substance as follows:

“This day the defendant, A. B. together with C. D., his or her surety, came before me, a clerk of the circuit court, and undertook that they would satisfy and pay E. F. his or her judgment, including interest (if any) and cost, amounting to dollars, rendered in his or her favor against A. B. by this court, within six (6) months, with legal interest on the whole amount thereof from this date.”

(b) At any time before a sale of property under the execution, any execution on a judgment or decree which could be stayed before the execution issued may, be stayed for six (6) months by the defendant's giving to the officer acting under the execution an obligation payable to the plaintiff with good security for the amount thereof including interest, cost, and half of the commissions up to that time. The obligation may be in substance as follows:

“We, A. B., principal, and E. F., surety, do bind ourselves six (6) months after the date hereof to pay C. D., the plaintiff in execution, the sum of \$..... dollars, to bear interest from this date, being the amount of an execution which issued from the office of the clerk of theCircuit Court Clerk on the day of, 20..... in favor of the said C. D. for the sum of \$ debt (or damages); \$ interest; \$ cost of suit; and \$ sheriff's half commission, amounting in the whole to the sum of \$ aforesaid, against the said A. B., and we, the said A. B. and E. F., surety, have stayed the same.

Witness our hands this day of, 20.....”

History. Civil Code, §§ 676, 677; Acts §§ 4294, 4295; Pope's Dig., §§ 5306, 5307; 1889, No. 66, §§ 1, 2, p. 82; C. & M. Dig., A.S.A. 1947, §§ 30-301, 30-302.

CASE NOTES

ANALYSIS

Exclusive method.
Guardian and ward.
Judgment liens.
Review of decree.
Sureties.

Exclusive Method.

This section and 16-66-301 provide the exclusive method of obtaining stay of judgment. *Taylor v. O'Kane*, 185 Ark. 782, 49 S.W.2d 400 (1932).

Guardian and Ward.

A stay may be allowed upon a judgment in favor of a ward against his guardian for money collected by the guardian as such and not paid to the ward. *Parker v. Wilson*, 99 Ark. 344, 137 S.W. 926 (1911).

Judgment Liens.

The filing of a stay bond does not affect a judgment lien on lands unless it extends beyond the period of limitations in which event the judgment creditor will be given a reasonable time in which to levy an

execution after the expiration of the stay bond. *Beloate v. New England Sec. Co.*, 128 Ark. 215, 193 S.W. 795 (1917).

Review of Decree.

Prohibition was not proper remedy of property owner to prevent enforcement of chancery court decree ordering conveyance of real property, but rather the proper procedure was to obtain a temporary stay under this section until Supreme Court could decide appeal on the merits. *Helmerich v. Benton County Chancery Court*, 233 Ark. 795, 348 S.W.2d 878 (1961).

Sureties.

Sureties on a supersedeas bond of defendants appealing from a judgment for the plaintiff, having made themselves parties to the suit by signing a supersedeas bond, are defendants within this section. *Morse Bros. Lumber Co. v. Burkhart Mfg. Co.*, 155 Ark. 350, 244 S.W. 350 (1922).

16-66-304. Sale of personal property suspended upon giving bond.

(a) The sale of personal property upon which an execution is levied shall be suspended at the instance of any person, other than the defendant in the execution, claiming the property, who shall execute with one (1) or more sureties a bond to the plaintiff in the execution, sufficient for double the property's value to the effect that if it is adjudged that the property or any part of it is subject to the execution, he or she will pay to the plaintiff the value of the property so subject and ten percent (10%) thereon, not exceeding the amount due on the execution and ten percent (10%) thereon.

(b) For the purpose of taking the bond mentioned in subsection (a) of this section, the officer shall select three (3) disinterested householders and administer to them an oath to make a fair appraisal of each article of the property, whose appraisal in writing shall be recited in the bond.

(c) The bond, with the appraisal annexed thereto, shall be returned to the circuit court of the county in which the levy was made.

(d)(1) The party to whom the bond is executed may move the court to which it is returned for a judgment thereon against all or any of the obligors, or their representatives, having given to them ten (10) days' notice of the motion.

(2) The court shall direct a jury to be impaneled and may cause such issues to be tried as it may prescribe. It may direct which party shall be considered plaintiff in the issue.

(3) If the property, or any part of it, is found subject to the execution, judgment shall be rendered in favor of the plaintiff therein for the value of the property so subject and ten percent (10%) thereon, not exceeding the amount due on the execution and ten percent (10%) thereon.

(4) An execution may be issued upon the judgment forthwith, on which the same endorsement shall be made as on the execution, in virtue of which the property had been seized.

(e) Upon the trial of the motion, either party may object that the property was not fairly appraised. Thereupon, the jury trying the facts shall hear evidence respecting and find the value of the property.

(f) The giving of the bond, mentioned in subsection (a) of this section, shall not discharge the levy of the execution upon the property claimed. But the officer may leave it subject to the lien of the levy with the person in whose possession it was found pending the proceeding on the bond, and may, in the meantime, proceed with the execution against any other property of the defendant.

History. Civil Code, §§ 727-732; C. & M. Dig., §§ 4311-4316; Pope's Dig., §§ 5323-5328; A.S.A. 1947, §§ 30-305 — 30-310.

CASE NOTES

ANALYSIS

Attachment.
Burden of proof.
Ownership.

Attachment.

This section applies as well to property about to be sold under a special execution in attachment, as to that levied on a special execution. *State v. Spikes*, 33 Ark. 801 (1878).

Burden of Proof.

In a contest between an execution plaintiff and an interpleader as to the ownership of property seized under execution, the court may direct that the latter assume the burden of proof. *Norton v. Elk Horn Bank*, 55 Ark. 59, 17 S.W. 362 (1891).

Under this section, the placing of the burden of proof is to be determined by the trial court according to circumstances; where the levy is made on property located in a public place based merely on

the assertion of the judgment creditor that it is the property of the judgment debtor, the creditor could properly be required to carry the burden of proving his assertion. *Velder v. Crown Exploration Co.*, 10 Ark. App. 273, 663 S.W.2d 205 (1984).

Where the property in issue was in the possession of debtor at the time of the levy, it was not improper to place the burden on intervenor who claimed ownership of the property even where not aided by prima facie evidence. *Velder v. Crown Exploration Co.*, 10 Ark. App. 273, 663 S.W.2d 205 (1984).

Ownership.

The evidence was held to sustain a finding that property levied upon as that of an execution defendant belonged to him and not his wife who intervened claiming it. *Winter v. Fly & Hobson Co.*, 170 Ark. 186, 279 S.W. 369 (1926).

Cited: *Velder v. Crown Exploration Co.*, 10 Ark. App. 273, 663 S.W.2d 205 (1984).

16-66-305. Waiver of right of stay.

An agreement to waive the right of stay, or any other legal agreement in relation to any judgment or decree, entered on the record among the orders of court, shall be specifically enforced. In such case, the proper endorsement shall be entered upon the execution by the clerk or justice.

History. Civil Code, § 678; C. & M. Dig., § 4296; Pope's Dig., § 5308; A.S.A. 1947, § 30-303.

SUBCHAPTER 4 — LEVY AND SALE

SECTION.

- 16-66-401. Selection of property to be sold — Levy.
- 16-66-402. Levy on real estate — Certificate of levy filed with recorder — Levy as notice to purchaser or mortgagee.
- 16-66-403. Levy on joint or partnership property — Assertion of claim.
- 16-66-404. Levy on shares or stock in corporations — Statement of shares and encumbrances.
- 16-66-405. Indemnifying bonds.
- 16-66-406. Forthcoming bond by owner — Default.
- 16-66-407. Expiration of term, death, etc., of officer after levy.
- 16-66-408. Notice of sale of real and personal property — Advertisement.
- 16-66-409. Time and method of sale.
- 16-66-410. Sale of real estate — Division into tracts.

SECTION.

- 16-66-411. Sale of lands subject to prior liens.
- 16-66-412. Sale of corporate stock — Certificates of purchase.
- 16-66-413. Sale on credit.
- 16-66-414. Default of bidder.
- 16-66-415. Officers not to bid at sale.
- 16-66-416. Return of execution.
- 16-66-417. Executions from court with similar jurisdiction to justice of the peace — Land exempt — Procedure when returned unsatisfied.
- 16-66-418. Discovery in aid of execution — Equitable proceedings — Attachment.
- 16-66-419. Discovery in aid of execution — Deposition.
- 16-66-420. Bill of sale — Delivery of property.
- 16-66-421. Instrument of conveyance.
- 16-66-422. Execution of instrument conveying improvements on public land.

Cross References. Sales of personal property made by order of court, § 18-49-104.

Sale under execution from a justice's court, § 16-19-1001 et seq.

Effective Dates. Acts 1868, No. 37, § 6: effective on passage.

Acts 1955, No. 162, § 4: approved Mar. 8, 1955. Emergency clause provided: "It is hereby determined as a matter of fact that

presently existing procedures for compelling discovery of assets by judgment debtors are inadequate in many cases to make effective the judgments of the courts, and that such inadequacy impairs the public peace, health and safety. An emergency is therefore hereby declared, and this act shall take effect from and after its passage."

RESEARCH REFERENCES

ALR. Inadequacy of price as basis for setting aside execution or sale. 5 ALR 4th 794.

Right of purchaser at execution sale, upon failure of title, to reimbursement or restitution from judgment creditor. 33 ALR 4th 1206.

Am. Jur. 30 Am. Jur. 2d, Exec., § 221 et seq.

Ark. L. Rev. Laurence, Enforcing a Money Judgment Against the Defendant's Stocks and Bonds: A Brief Foray into the Forbidding Realms of Article Eight and the Fourth Amendment, 38 Ark. L. Rev. 561.

C.J.S. 33 C.J.S., Exec., § 88-122 and § 196 et seq.

16-66-401. Selection of property to be sold — Levy.

The person against whom any execution may be issued may select what property, real or personal, shall be sold to satisfy the execution. If he or she gives to the officer a list of the property selected, sufficient to satisfy the execution, the officer shall levy upon that property and no other, if it is in his or her opinion sufficient to satisfy the execution and, if not, then upon such additional property as may be sufficient to satisfy the execution.

History. Rev. Stat., ch. 60, § 28; C. & M. Dig., § 4277; Pope's Dig., § 5289; A.S.A. 1947, § 30-401.

CASE NOTES**ANALYSIS**

Constitutionality.

Duty of officer.

Effect of stay or vacation of writ.

Notice and opportunity to select property.

Waiver of right.

Constitutionality.

Postjudgment exemption laws adequately provide for procedures and hearings by which a judgment debtor may exercise his or her rights to exemption claims or the return of levied property. It is the lack of a requirement of notice to the judgment debtor, however, that makes statutory provisions such as §§ 16-66-211 and 16-66-401 constitutionally deficient. *Duhon v. Gravett*, 302 Ark. 358, 790 S.W.2d 155 (1990).

Duty of Officer.

It is the duty of the officer in making a levy under execution to levy the execution upon property of the defendant within his jurisdiction sufficient to satisfy the execution and all proper fees and costs. *Saint Louis, I.M. & S. Ry. v. Andrews*, 102 Ark. 175, 143 S.W. 1084 (1912).

Effect of Stay or Vacation of Writ.

The statutory procedure or method of staying or vacating writs of execution on judgments, § 16-66-301 et seq., while apparently exclusive, does not preclude a person from seeking recovery for damages when, pursuant to a writ of execution, a sheriff intentionally or willfully takes property from persons who are in no way connected with the suit and judgment

from which the execution ensued. *Battle v. Harris*, 298 Ark. 241, 766 S.W.2d 431 (1989).

Notice and Opportunity to Select Property.

Where a judgment debtor's property was sold under execution without notice to the judgment debtor or the opportunity to select property on which levy should be made, the court properly canceled the execution deed on the ground that it was inequitable for the sale to stand. *Wade v. Deniston*, 180 Ark. 326, 21 S.W.2d 424 (1929).

Notice to judgment debtor, to be constitutional, need not supply the judgment debtor with a "laundry list" of statutory or constitutional exemptions or inform him of all available exemptions. Such notice need only inform the debtor that postjudgment execution is being levied and that state and federal exemptions may be available with respect to the property subject to the levy. *Duhon v. Gravett*, 302 Ark. 358, 790 S.W.2d 155 (1990).

Waiver of Right.

Where the judgment debtor refuses to either pay or supersede the judgment pending appeal and refuses to select property for sale, his rights under this section are not infringed by the deputy marshal's sale of his land. *United States v. Weir*, 235 F. Supp. 306 (E.D. Ark. 1963), *aff'd*, 339 F.2d 82 (8th Cir. 1964).

Cited: *Stephens v. Walker*, 743 F. Supp. 670 (W.D. Ark. 1990); *In re Bookout*, 231 Bankr. 306 (E.D. Ark. 1999).

16-66-402. Levy on real estate — Certificate of levy filed with recorder — Levy as notice to purchaser or mortgagee.

(a) It shall be the duty of the sheriff, United States Marshal, or other officer levying upon any real estate under and by virtue of any writ of attachment, execution, or other process to file with the recorder of deeds of the county in which the real estate is situated a certificate of the levy or seizure, together with a correct and full description of the real estate levied upon or seized by him or her. It shall be the duty of the recorder of deeds to index and record the certificate of the levy or seizure in the same manner as provided for notice of *lis pendens*.

(b) In all cases in which lands are seized or levied upon, which are lying and situated in a county other than that in which the judgment is a lien under the provisions of the laws of this state, the levy or seizure of real estate shall not be notice to a purchaser or mortgagee of any real estate until the filing of the notice as provided by subsection (a) of this section. However, if the notice is filed within twenty-four (24) hours of the levy or seizure, it shall be notice from the time the levy or seizure was made, but if not filed within twenty-four (24) hours after the levy or seizure, it shall only be notice from the time the notice was filed.

History. Acts 1903, No. 65, §§ 4, 5; C. §§ 8962, 8963; A.S.A. 1947, §§ 30-404, & M. Dig., §§ 6982, 6983; Pope's Dig., 30-405.

CASE NOTES

Lis Pendens.

The purchaser of land upon which a writ of attachment has been levied under the *lis pendens* statute is not an innocent purchaser for value. *Merchants & Farmers Bank v. Harris*, 113 Ark. 100, 167 S.W. 706 (1914).

Common-law and equity rule of *lis pendens* has been abrogated by the statute, and since its enactment an action affecting title is not *lis pendens* until notice has been filed in compliance with the statute. *Wilkins v. Jernigan*, 195 Ark. 546, 113 S.W.2d 108 (1938).

16-66-403. Levy on joint or partnership property — Assertion of claim.

(a) Whenever a sheriff or other officer levies an execution upon property or effects held jointly or in partnership by the debtor in the execution with others, to satisfy the separate debt of the debtor, the sheriff or other officer shall not proceed to make sale thereof, except as provided in this section if the person or persons, or any of them, holding a joint or partnership interest with the debtor, asserts a claim thereto, and, in writing, notifies the officer of the existence of the claim.

(b) Where any such levy is made, the officer shall give notice thereof, in writing, to the other joint owners or partners, if they are residing in his or her county, or to the agent, if any, of any joint owners or partners who are absent or nonresidents. If the joint owners or partners thereafter, for the space of fifteen (15) days, fail to give the officers

notice of their claim, the officer shall then proceed to advertise and sell the property so levied upon.

(c) When a claim is asserted by the joint owners or partners to the property levied upon, the officer shall not, by virtue of his or her levy, deprive the joint owners or partners of the possession of the property levied upon, except for the purpose of making an inventory thereof and having the property appraised.

(d) The officer shall proceed to have the property levied upon appraised as provided in § 16-66-304(b). He or she shall return the inventory and appraisal, with the execution to the officer from which it issued. In his or her return, he or she shall state all the facts connected with the levy by him or her and the claims, if any, set up by the joint owner or owners.

(e) The execution creditor shall have a lien upon the property levied upon, such as is given by law to executions in the hands of the officer, and which shall continue until the levy is disposed of.

(f) Upon the execution's being filed by the officer that he or she had levied the execution upon the property, in which the debtor was joint owner or partner and that the property was claimed by the other joint owners or partners, the execution creditor may proceed to subject to the satisfaction of his or her execution the interest of his or her debtor so levied upon.

(g)(1) If the creditor, at the commencement of his or her action or afterward, files an affidavit that he or she verily believes that the property levied upon will be removed from the county, sold, or otherwise disposed of with intent fraudulently to defeat his or her lien, the court, or judge thereof in vacation, or, if within the jurisdiction of a magistrate, then a justice of the peace, may make an order directing the officer to possess himself or herself of the property so levied upon, unless a bond with approved security is executed to the plaintiff in the execution, binding the obligors in the bond to have the same forthcoming, in obedience to any order or judgment of the court in the action.

(2) The bond shall be taken by the officer and returned by him or her to the court in which the action is pending.

History. Civil Code, §§ 742-748; C. & M. Dig., §§ 4280-4286; Pope's Dig., §§ 5292-5298; A.S.A. 1947, §§ 30-701 — 30-707; Acts 2003, No. 1185, § 201.

Amendments. The 2003 amendment substituted "a" for "an equitable or other"

in (a); deleted "by equitable proceedings" following "creditor may proceed" in (f); added the subsection designations in (g); and made gender neutral changes throughout.

CASE NOTES

ANALYSIS

Chancery jurisdiction.
Partners' interests.
Time of attachment.

Chancery Jurisdiction.

Where sheriff reported that he had found certain property, but others claimed to own it by reason of a mortgage, judgment creditor had a right to proceed in

chancery court. *Raley v. Mitchell*, 196 Ark. 504, 118 S.W.2d 674 (1938).

Partners' Interests.

Where the interest of a partner in the firm assets has been levied on under execution, and his copartner has given the officer notice of his claim therein, the officer cannot sell the interest until it has been ascertained and set apart by equitable proceedings. *Summers v. Heard*, 66 Ark. 550, 50 S.W. 78, 51 S.W. 1057 (1899).

The interest of a partner in firm property so far as his individual creditors are concerned is his share after paying the debts of the firm, including any debt he may owe to the firm. *Lewis v. Buford*, 93 Ark. 57, 124 S.W. 244 (1909).

Time of Attachment.

The lien attaches at the time of the seizure. *Harris v. Phillips*, 49 Ark. 58, 4 S.W. 196 (1886); *Jones v. Fletcher*, 132 Ark. 328, 200 S.W. 1034 (1918).

16-66-404. Levy on shares or stock in corporations — Statement of shares and encumbrances.

(a) Whenever an officer, having an execution or writ of attachment in his or her hands, levies on shares or stock in corporations, he or she shall make the levy or seizure by leaving a true copy of the writ with the president, secretary, cashier, or other officer, with the certificate of the officer making the levy, that he or she levies upon and takes such rights or shares to satisfy the execution.

(b) When an execution shall be issued against any shares or stock in any bank, insurance company, or other corporation, it shall be the duty of the cashier, secretary, or chief clerk thereof, upon the request of the officer having the execution, to furnish him or her with a certificate under his or her hand, stating the number of rights or shares the defendant holds in the bank, company, or corporation, with the encumbrances thereon.

History. Rev. Stat., ch. 60, § 26; Acts §§ 4278, 4279; Pope's Dig., §§ 5290, 5291; 1891, No. 21, §§ 1, 2; C. & M. Dig., A.S.A. 1947, §§ 30-402, 30-403.

CASE NOTES

ANALYSIS

Garnishment.
Notice.

Garnishment.

When a plaintiff in execution wishes to reach stock owned by the defendant in a corporation, he should follow the provisions of this section and the bringing of garnishment proceedings against the corporation is improper. *Farmers State Bank v. Southern Cotton Oil Co.*, 127 Ark. 278, 192 S.W. 230 (1917).

Garnishment will not reach shares of stock in a garnishee corporation belonging to a judgment debtor. *Southwestern Gas & Elec. Co. v. W.O. Perkins & Son*, 185 Ark. 830, 49 S.W.2d 606 (1932).

Notice.

A delivery by a sheriff of a notice to the proper officer of a corporation, after the order of attachment had been filed in the clerk's office, was a delivery after the sheriff's power to act under the writ had ceased to exist and consequently there was not attachment of the shares. *Deutschman v. Byrne*, 64 Ark. 111, 40 S.W. 780 (1897).

In order to attach shares under this section, it is necessary to deliver to one of the officers or agents named therein a notice in writing or certificate specifying the same; otherwise the court is without authority to condemn any stock to be sold to satisfy debt or judgment. *H.B. Clafflin Co. v. Bretzfelder*, 69 Ark. 271, 62 S.W. 905 (1901).

16-66-405. Indemnifying bonds.

(a)(1) If an officer who levies, or is required to levy, an execution upon personal property, doubts whether it is subject to execution, he or she may give to the plaintiff therein, or his or her agent or attorney, notice that an indemnifying bond is required.

(2) Bond may, thereupon, be given by or for the plaintiff, with one (1) or more sufficient sureties to be approved by the officer, to the effect that the obligors therein will indemnify him or her against the damage he may sustain in consequence of the seizure or sale of the property, will pay to any claimant thereof the damages he or she may sustain in consequence of the seizure or sale, and will warrant to any purchaser of the property such estate or interest therein as is sold.

(3) Thereupon, the officer shall proceed to subject the property to the execution and shall return the indemnifying bond to the circuit court of the county from which the execution issued.

(b) If the bond mentioned in subsection (a) of this section is not given, the officer or she may refuse to levy the execution or, if it had been levied, and the bond is not given in a reasonable time after it is required by the officer, he or she may restore the property to the person from whose possession it was taken, and the levy shall stand discharged.

(c)(1) The claimant or purchaser of any property, for the seizure or sale of which an indemnifying bond has been taken and returned by the officer, shall be barred of any action against the officer levying upon the property if the surety was good when it was taken.

(2) The claimant or purchaser may maintain an action upon the bond and recover such damages as he or she may be entitled to.

(d) When property for the sale of which the officer is indemnified sells for more than enough to satisfy the execution under which it was taken, the surplus shall be paid into the court to which the indemnifying bond is directed to be returned. That court may order such disposition or payment of the money to be made temporarily or absolutely as may be proper in respect to the rights of the parties interested.

(e) No officer shall require any agent of the State of Arkansas, or any political subdivision thereof, to post an indemnifying bond prior to an execution on personal property.

History. Civil Code, §§ 723-726; C. & §§ 5299-5302; A.S.A. 1947, §§ 30-408 — M. Dig., §§ 4287-4290; Pope's Dig., 30-411; Acts 1995, No. 1183, § 1.

CASE NOTES**ANALYSIS**

In general.
Doubt.
Real property.

In General.

In order to compel sheriff to levy on personal property, an indemnifying bond

must be furnished. *Keith v. Drainage Dist.* No. 7, 183 Ark. 786, 38 S.W.2d 755 (1931).

Doubt.

The doubt as to whether the property is subject to sale must not be an arbitrary one. *Mayfield Woolen Mills v. Lewis*, 89 Ark. 488, 117 S.W. 558 (1909).

A sheriff may not demand an indemnifying bond in all cases before levying an execution, except when, acting in good faith, he doubts that property is subject to execution which appears to be so. *Endicott-Johnson Corp. v. Davis*, 186 Ark. 788, 56 S.W.2d 178 (1933).

Real Property.

This section confers no authority with respect to real property. *Smith v. Spradlin*, 136 Ark. 204, 206 S.W. 327 (1918).

Cited: *Williams v. Brooks*, 3 Ark. App. 130, 623 S.W.2d 216 (1981).

16-66-406. Forthcoming bond by owner — Default.

(a)(1) The owner of personal estate taken in execution may give to the officer levying on the personal estate an obligation, with good surety, to have the property forthcoming at the time and place of sale, specifying in the obligation each article of property and its value.

(2) The obligation may be in substance as follows:

“We, A. B., principal, and C. D., surety, do bind ourselves that the property mentioned in the following schedule and valuation, to wit: valued at \$ (naming each article and its value), shall be forthcoming at, on the day of next, at the hour of twelve o'clock in the day.

“Witness our hands, this ... day of, 20”

(3) Upon the giving of the obligation, the officer shall return the possession of the property, so taken in execution, to the defendant, to remain with him or her, at his or her own risk and expense, until the time specified for its delivery.

(b)(1) If the defendant fails to pay or stay the amount of the execution and fails to deliver so much of the property specified in the forthcoming obligation or other property in its place, as is sufficient to satisfy the execution and all costs and commissions, the officer shall return the execution and bond to the office from which the execution was issued and endorse on the execution the levy, the giving of the bond, and the particular property which is not forthcoming, and the other facts.

(2) The surety on the bond shall be liable only for the value of the property specified in the bond, which is not forthcoming, with interest thereon, from the date of the bond, and accruing costs.

(3) If the property specified in the forthcoming bond is not of value sufficient to satisfy the execution and all costs and commissions, the proper officer may issue another execution and credit the execution with the value of the property specified in the bond.

(c) An officer taking a forthcoming bond, who shall fail to return the bond to the proper officer for twenty (20) days, after the failure to comply on the part of the defendant shall, with his or her sureties, be liable to the plaintiff for the amount of the execution, costs, and commission, and twenty percent (20%) thereon, to be recovered by action against any one (1) or more of them or their representatives.

History. Civil Code, §§ 680-682; C. & §§ 5310-5315; A.S.A. 1947, §§ 30-412 — M. Dig., §§ 4298-4303; Pope's Dig., 30-414.

16-66-407. Expiration of term, death, etc., of officer after levy.

(a) Where an officer has levied upon any goods and chattels, real estate, or other effects, by virtue of any execution, and the term of service of the officer expires and is terminated before or after the sale thereof, and before the purchaser has obtained a deed therefor, the officer shall nevertheless have power to do and perform all things in relation to the execution, and the sale of the property, and in making and acknowledging a deed to the purchaser, to all intents and purposes, as if his or her term of service had not expired. The officer and his or her securities shall be subject to the same penalties, actions, proceedings, and judgments for neglect, misconduct, or failure therein, as if he or she had still continued in office.

(b) When any officer dies or is removed from office, or is otherwise disqualified from acting, after having taken in execution any goods and chattels, real estate, shares, or other effects, and before sale thereof, the sheriff or coroner then in office shall proceed thereon, and do and perform all things remaining to be done and performed in relation to the execution, and the sale of the property, and in making and executing deeds and conveyances therefor, in the same manner and with the same effect as the officer so deceased, removed from office, or disqualified could have done.

History. Rev. Stat., ch. 60, §§ 59, 60; §§ 5369, 5370; A.S.A. 1947, §§ 30-415, C. & M. Dig., §§ 4357, 4358; Pope's Dig., 30-416.

CASE NOTES**Duties Unfinished.**

It is only when his duties remain unfinished that execution should issue to for-

mer sheriff. State ex rel. Cotton v. Atkinson, 53 Ark. 98, 13 S.W. 415 (1890).

16-66-408. Notice of sale of real and personal property — Advertisement.

(a) The time and place of sale of real property upon execution, by virtue of a judgment, or order of sale, must be advertised for at least twenty (20) days, next before the day of sale by posting printed advertisements at the courthouse door and five (5) other public places in the county in which the sale is to be made, one (1) of which is to be upon the premises to be sold, and by publishing the advertisement in a weekly newspaper, if there is one, in the county for at least two insertions before the day of sale.

(b)(1) The time and place of sale of personal property shall be advertised by posting written or printed notices at three (3) of the most public places in the vicinity of the place of sale.

(2) No goods and chattels or other personal effects, seized and taken by virtue of any execution, shall be sold until the officer making the sale shall have given at least ten (10) days' notice of the time and place of sale and the property to be sold.

History. Rev. Stat., ch. 60, § 36; Civil Code, § 690; C. & M. Dig., §§ 4321, 4323; Pope's Dig., §§ 5335, 5353; A.S.A. 1947, §§ 30-417, 30-418.

CASE NOTES

ANALYSIS

Deeds.
Equity.
Fraudulent sales.
Judicial sales.
Liens.
Purchaser.
Sale held invalid.
Sale after return day.
Sale price.
Waiver of irregularities.

Deeds.

A complaint by a judgment creditor who purchased land at his own execution sale seeking to have the sheriff's deed reformed will be dismissed where such deed fails to show on its face that printed advertisements of the sale were posted and there was no other evidence that notice was given. *Russell v. Williamson*, 67 Ark. 80, 53 S.W. 561 (1899).

Equity.

Where there has been no fair competition, equity will annul the sale. *Bennett v. Hutson*, 33 Ark. 762 (1878).

When a judgment creditor, who has purchased at execution sale in satisfaction of the judgment, finds the sale was irregular, he may go into chancery and have the sale set aside and a resale ordered. *Catchings v. Harcrow*, 49 Ark. 20, 3 S.W. 884 (1886).

A mere irregularity in the conduct of a sale under an execution in an action at law will not be a ground for relief in equity as the law court had supervisory jurisdiction over its own process. *Walker v. Files*, 94 Ark. 453, 127 S.W. 739 (1910).

Fraudulent Sales.

The practice of selling lands under execution that have been fraudulently conveyed should not be encouraged. *Apperson & Co. v. Burgett*, 33 Ark. 328 (1878); *Youngblood v. Cunningham*, 38 Ark. 571 (1882).

Evidence sufficient to find that sale was fraudulent and thus void. *Jennings v. Carter*, 53 Ark. 242, 13 S.W. 800 (1890).

Judicial Sales.

Sales under execution are not judicial sales. *Hershy v. Latham*, 42 Ark. 305

(1883); *Webster v. Daniel & Straus*, 47 Ark. 131, 14 S.W. 550 (1886); *Farnsworth v. Hoover*, 66 Ark. 367, 50 S.W. 865 (1899).

The chancery court lacked jurisdiction to act to set aside its order of confirmation of the commissioner's report of a judicial sale because it did not set aside the order within ninety days of the date of its entry as required by ARCP 60. *Strong v. Morgan*, 58 Ark. App. 272, 950 S.W.2d 466 (1997).

Liens.

A lien acquired by levy is superior to prior unrecorded mortgage, though it be recorded before the sale under execution. *Hawkins v. Files*, 51 Ark. 417, 11 S.W. 681 (1888).

Purchaser.

The want of an advertisement will not avoid a sale against an innocent purchaser. *Newton v. State Bank*, 22 Ark. (9 Barber) 19 (1860); *Youngblood v. Cunningham*, 38 Ark. 571 (1882).

A mistake in the advertisement will not avoid the sale as against an innocent purchaser. *Files v. Harbison*, 29 Ark. 307 (1874).

When the plaintiff buys, he is not an innocent purchaser. *Hill, Fontaine & Co. v. Coolidge*, 33 Ark. 621 (1878); *Williams v. McIlroy*, 34 Ark. 85 (1879).

Errors and irregularities which do not render the execution a nullity will not invalidate a sale to an innocent purchaser. *Huffman v. Gaines*, 47 Ark. 226, 1 S.W. 100 (1886).

Mere irregularities in the process will not avoid a sale to a purchaser who is not proved to be at fault. *Stotts v. Brookfield*, 55 Ark. 307, 18 S.W. 179 (1892).

Sale Held Invalid.

The fact that the sheriff failed to meet this section's notice requirements, combined with the fact that the attorney for the executing plaintiff had his grandson purchase the seized vehicle, indicated that the sale was collusive, and therefore invalid. *Garrett v. Walker*, 172 Bankr. 29 (Bankr. E.D. Ark. 1994).

Sale after Return Day.

A sale after the return day is void.

Hightower v. Handlin & Venneys, 27 Ark. 20 (1871).

Sale Price.

Mere inadequacy of price will not invalidate the sale. *Newton v. State Bank*, 22 Ark. (9 Barber) 19 (1860); *Pindall v. Trevor & Colgate*, 30 Ark. 249 (1875).

When the execution is for much more than is due on the judgment, the sale is void. *Hightower v. Handlin & Venneys*, 27 Ark. 20 (1871).

Waiver of Irregularities.

One who induces another to purchase his land under execution cannot afterward allege irregularities in the sale. *Turner v. Watkins*, 31 Ark. 429 (1876); *Youngblood v. Cunningham*, 38 Ark. 571 (1882).

A debtor may waive irregularities in the sale, and does so when he accepts and returns a surplus therefrom, after knowledge of the irregularities. *Huffman v. Gaines*, 47 Ark. 226, 1 S.W. 100 (1886).

16-66-409. Time and method of sale.

(a) All property taken in execution by any officer shall be exposed to sale on the day for which it was advertised, between the hours of 9:00 A.M. and 3:00 P.M., publicly, by auction, for ready money, and the highest bidder shall be the purchaser.

(b)(1) The sale of real estate is not required to be made upon a court day, but it may be made at any other time, after being duly advertised.

(2) The sale is to be made at the courthouse door unless, at the request of the defendant who owns the land, the officer shall appoint the sale upon the premises.

(3) Where there has been one (1) failure to sell for want of bidders, the officer may appoint the sale at the courthouse door, or on the premises, as he or she shall deem most likely to secure a fair sale.

History. Rev. Stat., ch. 60, § 48; Civil Code, § 690; C. & M. Dig., §§ 4317, 4324, 4325; Pope's Dig., §§ 4329, 4336, 4337; A.S.A. 1947, §§ 30-419, 30-420.

CASE NOTES

ANALYSIS

In general.
Applicability.
Restoration of property.
Sale held invalid.
Sale on credit.
Sale price.

In General.

This section is directory. *Feild v. Dortch*, 34 Ark. 399 (1879); *Reynolds v. Tenant*, 51 Ark. 84, 9 S.W. 857 (1888); *Taylor v. Georgia State Sav. Ass'n*, 141 Ark. 425, 218 S.W. 180 (1920).

Applicability.

This section does not apply to sales by commissioners under chancery orders. *Knight v. Equitable Life Assurance Soc'y*, 186 Ark. 150, 52 S.W.2d 977 (1932).

Restoration of Property.

Purchaser at own execution sale may

restore property upon reversal of judgment. *McCracken v. Paul*, 65 Ark. 553, 47 S.W. 854 (1898).

Sale Held Invalid.

The fact that the sheriff failed to meet this section's requirements, combined with the fact that the attorney for the executing plaintiff had his grandson purchase the seized vehicle, indicated that the sale was collusive, and therefore invalid. *Garrett v. Walker*, 172 Bankr. 29 (Bankr. E.D. Ark. 1994).

Sale on Credit.

All sales made by order of court must be on a credit. *Welch v. Hicks*, 27 Ark. 292 (1871).

Sale Price.

A sale for an excessive amount is void. *Downs v. Dennis*, 83 Ark. 71, 102 S.W. 699 (1907).

16-66-410. Sale of real estate — Division into tracts.

(a) In all sales of real estate, under execution, when the tract or tracts to be sold contain more than forty (40) acres, the real estate shall be divided as the owner or owners may direct into lots containing not more than forty (40) nor less than twenty (20) acres. The officer whose duty it may be to sell the property shall begin at one (1) corner of the real estate, to be designated in the notice published by him advertising the sale, and proceed to sell in the tracts of not more than forty (40) nor less than twenty (20) acres each, of contiguous territory, until the whole of the tract or tracts is disposed of unless the execution is sooner satisfied.

(b) In all sales of school lands, those sales shall commence at the northeast corner and shall be made in tracts of not more than forty (40) acres each, so long as there shall be as much as forty (40) acres remaining to be sold.

(c) In all cases where the corner at which the sale is to commence has not been designated in accordance with subsection (a) of this section, the officer whose duty it may be to sell the tract or tracts of land shall commence at the northeast corner as required in subsection (b) of this section.

(d) The provisions of this section shall not extend to lands sold for taxes.

History. Acts 1868, No. 37, §§ 1-3, 5, Dig., §§ 5338, 5339; A.S.A. 1947, §§ 30-p. 122; C. & M. Dig., §§ 4326, 4327; Pope's 421, 30-422, 30-422n., 30-423.

CASE NOTES**Waiver.**

The failure of the judgment debtor to either designate the property to be sold or to request that his farm be divided into

lots for sale waived his rights under this section. *United States v. Weir*, 235 F. Supp. 306 (E.D. Ark. 1963), *aff'd*, 339 F.2d 82 (8th Cir. 1964).

16-66-411. Sale of lands subject to prior liens.

(a) A sale of lands under a junior judgment shall pass the title of the defendant, subject to the lien of all prior judgments and decrees then in force.

(b) The money arising from the sale of lands under a junior judgment shall be applied to the payment of the judgment under which it may have been made.

History. Rev. Stat., ch. 84, §§ 4, 5; C. §§ 8257, 8258; A.S.A. 1947, §§ 30-424, & M. Dig., §§ 6301, 6302; Pope's Dig., 30-425.

CASE NOTES

ANALYSIS

Prior attachment.

Priority of lien.

Prior Attachment.

A sale of lands under a junior attachment does not release the lien of a prior attachment, and the money arising from such sale is not to be applied in payment

of prior attachment. *Hanauer & Co. v. Casey*, 26 Ark. 352 (1870).

Priority of Lien.

Judgment creditor who first files a suit in equity to uncover property fraudulently conveyed acquires the first lien. *Doster v. Mainstee Nat'l Bank*, 67 Ark. 325, 55 S.W. 137 (1900).

16-66-412. Sale of corporate stock — Certificates of purchase.

(a) Shares or stock levied upon or seized shall be sold by the officer in the same manner as other personal property is sold under the writ by virtue of which the levy is made. The officer making the sale shall execute and deliver to the purchaser a certificate, which certificate may be in the following form:

"I (name of the officer and his office) hereby certify, that I have this day of sold to (name of purchaser) shares of the Capital Stock of the (name of the corporation) in conformity with the laws of the state, which said shares were by me seized on the day of, under and by virtue of a certain writ of (describe the writ) and issued and delivered to me out of the Court, on the day of, in favor of (name of plaintiff) against (name of defendant) for the sum and price of \$...., which was the highest and best bid therefor.

Witness my hand this day of"

(b) Upon presentation of the certificate to the president, secretary, cashier, or other principal officer of the corporation, who has charge of the stock books of the corporation, it shall be the duty of such officer to issue to the holder of the certificate a certificate of stock for the number of shares thus levied on and sold and transfer it on the stock books of the corporation, in the same manner as if transferred by the owner in person. When so transferred, the stock of the person whose interest has been sold by the officer under the writ of execution or attachment shall be deemed cancelled and wholly void.

History. Acts 1891, No. 21, §§ 2, 3; C. §§ 5355, 5356; A.S.A. 1947, §§ 30-436, & M. Dig., §§ 4343, 4344; Pope's Dig., 30-437.

16-66-413. Sale on credit.

(a)(1) In all cases where the right to stay the execution exists and is not exercised, sales under the execution shall be on a credit of three (3) months, upon the purchaser's giving bond and good security to the plaintiff in the execution for the payment of the sale money, bearing interest from date.

(2) The bond may be in substance as follows:

“A. B., principal, and C. D., surety, do bind ourselves to pay E. F., within three months from the date hereof, the sum of \$, with interest thereon from this date, being the purchase money (here set out the several articles of property so purchased, with the price of each), which was this day sold by G. H., sheriff (or constable, as the case may be) of County, in satisfaction of an execution which issued from the office of the Clerk of the Circuit Court Clerk, (or K. L., a justice of the peace) on the day of, in favor of the said E. F., against M. O., for the sum of \$ debt or damages, with interest and costs.

“Given under our hands, this day of, 20....”

(b)(1) When property sold on credit sells for more than will satisfy the execution, costs, and commission, the officer making the sale shall take a bond payable to the defendant, the owner of the property, for the excess, similar in every other respect to that directed in subsection (a) of this section to be taken to the plaintiff, and to have the same force and effect, and on which the same proceedings may be had.

(2) If the property is sold for cash in hand, any excess over satisfying the execution, charges, and commissions shall be paid over by the officer to the defendant whose property is sold.

History. Civil Code, §§ 683, 684; C. & M. Dig., §§ 4318, 4319; Pope's Dig., §§ 5330, 5331; A.S.A. 1947, §§ 30-426, 30-427.

not apply to sales made by constables on executions issued by a justice of the peace since it is superseded by §§ 16-19-1004, 16-19-1008 and 16-19-1009 with respect to such sales.

Publisher's Notes. This section does

CASE NOTES

ANALYSIS

Applicability.
Decree.
Interest.

Applicability.

This section has no application to criminal proceedings. *Hall v. Doyle*, 35 Ark. 445 (1880).

Decree.

Decree ordering real property sold, without stating that it is to be on credit, is erroneous. *Fry v. Street*, 37 Ark. 39 (1881).

Interest.

Interest at the rate of six percent only can be charged on the deferred payment, but the sale is not voided where the selling officer undertook to charge eight percent interest where the purchaser did not base his refusal to complete the sale on that ground. *Fulbright v. Morton*, 131 Ark. 492, 199 S.W. 542 (1917).

Cited: *Miller v. Alamo*, 975 F.2d 547 (8th Cir. 1992).

16-66-414. Default of bidder.

(a) If any person refuses to pay the amount bid for any property struck off to him or her, the officer making the sale may again sell the property to the highest bidder. If any loss is occasioned, the officer may recover the loss by motion before any court or justice of the peace, if the amount of the loss does not exceed his or her jurisdiction.

(b) The court or justice shall proceed in a summary manner and give judgment and award execution therefor forthwith.

(c) The same proceedings may be had against any subsequent purchaser who refuses to pay. The officer may forever thereafter refuse the bid of the person refusing to pay for property purchased by him or her.

History. Rev. Stat., ch. 60, §§ 49, 50; §§ 5332, 5333; A.S.A. 1947, §§ 30-428, C. & M. Dig., §§ 4320, 4321; Pope's Dig., 30-429.

CASE NOTES

Other Laws.

This section does not supersede the common-law remedy which the selling officer had of maintaining an action against the purchaser for the full amount of his

bid. *Fulbright v. Morton*, 131 Ark. 492, 199 S.W. 542 (1917).

This section is cumulative, not exclusive. *Maxwell v. Mitchell*, 185 Ark. 248, 46 S.W.2d 794 (1932).

16-66-415. Officers not to bid at sale.

No officer to whom any execution may be directed, any of his or her deputies, or any person for them shall purchase any goods and chattels, real estate, or other effects at any sale made by virtue of any such execution. All purchases so made shall be void.

History. Rev. Stat., ch. 60, § 51; C. & M. Dig., § 4322; Pope's Dig., § 5334; A.S.A. 1947, § 30-430.

16-66-416. Return of execution.

(a) All executions shall be returnable in sixty (60) days from their date.

(b)(1) If an execution is satisfied, the officer may return thereon in substance, "satisfied", unless it is by the sale of the property, then that fact must be stated.

(2) If satisfied in part, he or she must state what part and why the residue is not made.

(3) If levied and no sale has been had, for the want of bidders, or no property has been found, he or she must state that fact.

History. Civil Code, § 673; C. & M. Dig., §§ 4353-4356; Pope's Dig., §§ 5365-5368; A.S.A. 1947, §§ 30-431 — 30-434.

CASE NOTES

ANALYSIS

In general.

Endorsement.

Failure to make timely return.

Return day.

Service.

In General.

A return on a writ of execution is the

short official statement of the officer, indorsed thereon or attached thereto, of what he has done in obedience to the mandate of the writ or of the reason why he has done nothing. The return of execution consists of the two acts of writing out the statements on the writ or on an attached paper and the filing; the mere writing out of the statement is not suffi-

cient without filing it, and vice versa, the mere filing of the writ with no statement is not a return. *Lindsey Family Trust v. Cauthron*, 20 Ark. App. 149, 725 S.W.2d 581 (1987).

Endorsement.

This section requires within 60 days the endorsement upon the writ of what the officer has done and filing of it with the clerk who issued it. *Smith v. Drake*, 174 Ark. 715, 297 S.W. 817 (1927).

Upon a motion for summary judgment for failure to return an execution within 60 days as required by law, his endorsement in writing of service of the writ of execution not filed until after expiration of 60 days was held not a return within the 60-day period. *Smith v. Drake*, 174 Ark. 715, 297 S.W. 817 (1927).

Failure to Make Timely Return.

This section is mandatory and the fact that while an execution was in the sheriff's hands the judgment was set aside did not excuse the sheriff from making return within the statutory time. *J.B. Pearson Flour & Feed Co. v. Pittman*, 192 Ark. 1062, 95 S.W.2d 1143 (1936).

Sheriff's failure to return execution within the required time may be excusable, in action against him by judgment creditor, where failure was due at least in part to judgment creditor. *Southern Credit Corp. v. Atkinson*, 255 Ark. 615, 502 S.W.2d 497 (1973).

The automatic stay provision of the U.S. bankruptcy code does not relieve the sher-

iff of the statutory duty to file a return within 60 days. This section requires a return be filed within 60 days, even where the return merely states that the sheriff did not act against the debtor because the debtor has filed in bankruptcy court. *Lindsey Family Trust v. Cauthron*, 20 Ark. App. 149, 725 S.W.2d 581 (1987).

Return Day.

Although execution was made returnable more than 60 days from date, if sale was made within 60-day period, the sale is not void and the execution merely voidable. *Youngblood v. Cunningham*, 38 Ark. 571 (1882).

Executions may be returned before the return day. *Reeves v. Sherwood*, 45 Ark. 520 (1885); *Hawkins v. Taylor*, 56 Ark. 45, 19 S.W. 105 (1892).

This section does not impose a requirement that personal property be sold before the return day. *555, Inc. v. Barlow*, 3 Ark. App. 139, 623 S.W.2d 843 (1981).

Service.

When sheriff returned execution unserved whether for lack of indemnity bond or other good reason, the power of the execution was exhausted and it was functus officio. *Pate v. Griffin*, 225 Ark. 1032, 287 S.W.2d 453 (1956).

Cited: *Hamilton v. Pan Am. S. Corp.*, 238 Ark. 38, 378 S.W.2d 652 (1964); *Searcy v. Cooper*, 239 Ark. 280, 388 S.W.2d 918 (1965); *Vinson Elec. Supply, Inc. v. Poteete*, 321 Ark. 516, 905 S.W.2d 831 (1995).

16-66-417. Executions from court with similar jurisdiction to justice of the peace — Land exempt — Procedure when returned unsatisfied.

(a) Land shall not be levied on or sold under execution from a justice of the peace's court or any court of similar jurisdiction.

(b) When an execution on a judgment of a court of similar jurisdiction to the justice of the peace courts has been returned by a constable or other officer, either as to the whole or a part thereof, in substance, "no property found to satisfy the same", the plaintiff may obtain from the justice a certified copy of the judgment and execution and return and file the same in the circuit clerk's office of the county in which the judgment was rendered, which copies shall be copied by the clerk in a book kept for that purpose. Thereupon, the clerk shall issue writs of execution on the judgment for the amount due thereon and the costs, including the costs of the copies by the justice and copying by the clerk,

which shall be levied and proceeded on as executions on judgments of the circuit court.

History. Civil Code, §§ 826, 827; be affected by §§ 16-19-1004 and 16-19-1011(a). A.S.A. 1947, §§ 30-406, 30-407.

Publisher's Notes. This section may

16-66-418. Discovery in aid of execution — Equitable proceedings — Attachment.

(a)(1) After an execution of fieri facias directed to the county in which the judgment was rendered or to the county of the defendant's residence is returned by the proper officer, either as to the whole or part thereof, in substance, no property found to satisfy the execution, the plaintiff in the execution may institute an action in the court from which the execution issued, or in the court of any county in which the defendant resides or is summoned, for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled to the satisfaction of the judgment.

(2) In such actions, persons indebted to the defendant in the execution or holding the money or property in which he has an interest, or holding the evidences or securities for the same, may be also made defendants.

(b) The answers of each defendant shall be verified by his or her own oath and not by that of an agent or attorney, and the court shall enforce full and explicit discoveries in the answers by attachment.

(c) In the actions mentioned in the preceding subsections, the plaintiff may have an attachment against the property of the defendant in the execution, similar to the general attachments provided for in Chapter III of Title VIII of the code, without either the affidavit or bond therein required.

(d) A lien shall be created upon the property of the defendant, the levy of the attachment, or service of the summons with the object of the action endorsed thereon, on the person holding or controlling his property.

(e) The court shall enforce the surrender of the money, or security therefor, or of any other property of the defendant in the execution which may be discovered in the action. For this purpose, the court may commit to jail any defendant or garnishee failing or refusing to make such surrender, until it shall be done, or the court is satisfied that it is out of his or her power to do so.

History. Civil Code, §§ 473-477; C. & M. Dig., §§ 4366, 4368-4371; Pope's Dig., §§ 5378, 5380-5383; A.S.A. 1947, §§ 30-901 — 30-905; Acts 2003, No. 1185, § 202.

Publisher's Notes. Chapter III of Title VIII of the code, referred to in this section,

means §§ 216-291 of the Code of Practice in Civil Cases of 1869. See parallel reference tables in tables volume.

Amendments. The 2003 amendment deleted "by equitable proceedings" following "may institute an action" in (a)(1).

RESEARCH REFERENCES

Ark. L. Rev. Discovery Procedure in Aid of Judgment, 9 Ark. L. Rev. 390.

Killenbeck, And Then They Did ...? Abusing Equity in the Name of Justice, 44 Ark. L. Rev. 235.

Discovery — Amount of Adversary's Insurance, 9 Ark. L. Rev. 456.

CASE NOTES

ANALYSIS

Construction.
Chose in action.
Complaints.
Jurisdiction.
Liens.
Parties.
Payment.
Public corporation.
Substantial compliance.
Suit for attachment and conversion.

Construction.

"Defendant" designated in language, "or in the court of any county in which the defendant resides, or is summoned," has reference to judgment debtor defendant. *Ritchie Grocer Co. v. Arnold*, 218 Ark. 436, 236 S.W.2d 718 (1951).

Chose in Action.

A "chose in action," as used in subdivision (a)(1) of this section, means, literally, a thing in action, and is the right of bringing an action, or a right to recover a debt or money, or a right of proceeding in a court of law to procure the payment of a sum of money, or a right to recover a personal chattel or a sum of money by action; a chose in action is property, and to deny someone the same violates U.S. Const. Amend. 14. *Agribank, FCB v. Cupples*, 850 F. Supp. 780 (E.D. Ark. 1993).

If there is legal authority in this state to attach a writ of execution to property in general, then that right must also extend to cover choses in action. *Agribank, FCB v. Cupples*, 850 F. Supp. 780 (E.D. Ark. 1993).

Complaints.

Complaint was held to state a cause of action under this section. *Morgan Utils., Inc. v. Perry County*, 183 Ark. 542, 37 S.W.2d 74 (1931).

Jurisdiction.

Chancery court had jurisdiction of cred-

itor's suit based on a foreign judgment against nonresident debtor statutorily served in other state, since judgment at law on the foreign judgment in the state could not be obtained. *Miller v. Maryland Cas. Co.*, 207 Ark. 312, 180 S.W.2d 581 (1944).

Discovery proceeding was not within jurisdiction of chancery court. *Ritchie Grocer Co. v. Arnold*, 218 Ark. 436, 236 S.W.2d 718 (1951).

Order issued by circuit court in action which required an equitable proceeding under this section was reversed and remanded for transfer to chancery court. *Cummings v. Fingers*, 296 Ark. 276, 753 S.W.2d 865 (1988).

Liens.

While a judgment creditor may establish a lien upon the property of an apparently insolvent debtor in the hands of a third party by instituting equitable proceedings to subject the property to the payment of his claim, neither this nor the subsequent sections can give the judgment creditor a prior lien on the property over an existing lien in favor of a third person not made a party to the suit. *N.M. Uri & Co. v. McCroskey*, 135 Ark. 537, 205 S.W. 976 (1918).

Parties.

Proceedings for discovery against third party must be in connection with proceedings against judgment debtor who is indispensable party to suit. *Ritchie Grocer Co. v. Arnold*, 218 Ark. 436, 236 S.W.2d 718 (1951).

When suit is instituted against judgment debtor in proper forum for discovery of his property, third persons indebted to him or holding property in which he has interest may be made parties defendant. *Ritchie Grocer Co. v. Arnold*, 218 Ark. 436, 236 S.W.2d 718 (1951).

Payment.

Order of court that debtor pay into court

which shall be levied and proceeded on as executions on judgments of the circuit court.

History. Civil Code, §§ 826, 827; be affected by §§ 16-19-1004 and 16-19-A.S.A. 1947, §§ 30-406, 30-407. 1011(a).

Publisher's Notes. This section may

16-66-418. Discovery in aid of execution — Equitable proceedings — Attachment.

(a)(1) After an execution of fieri facias directed to the county in which the judgment was rendered or to the county of the defendant's residence is returned by the proper officer, either as to the whole or part thereof, in substance, no property found to satisfy the execution, the plaintiff in the execution may institute an action in the court from which the execution issued, or in the court of any county in which the defendant resides or is summoned, for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled to the satisfaction of the judgment.

(2) In such actions, persons indebted to the defendant in the execution or holding the money or property in which he has an interest, or holding the evidences or securities for the same, may be also made defendants.

(b) The answers of each defendant shall be verified by his or her own oath and not by that of an agent or attorney, and the court shall enforce full and explicit discoveries in the answers by attachment.

(c) In the actions mentioned in the preceding subsections, the plaintiff may have an attachment against the property of the defendant in the execution, similar to the general attachments provided for in Chapter III of Title VIII of the code, without either the affidavit or bond therein required.

(d) A lien shall be created upon the property of the defendant, the levy of the attachment, or service of the summons with the object of the action endorsed thereon, on the person holding or controlling his property.

(e) The court shall enforce the surrender of the money, or security therefor, or of any other property of the defendant in the execution which may be discovered in the action. For this purpose, the court may commit to jail any defendant or garnishee failing or refusing to make such surrender, until it shall be done, or the court is satisfied that it is out of his or her power to do so.

History. Civil Code, §§ 473-477; C. & M. Dig., §§ 4366, 4368-4371; Pope's Dig., §§ 5378, 5380-5383; A.S.A. 1947, §§ 30-901 — 30-905; Acts 2003, No. 1185, § 202.

Publisher's Notes. Chapter III of Title VIII of the code, referred to in this section,

means §§ 216-291 of the Code of Practice in Civil Cases of 1869. See parallel reference tables in tables volume.

Amendments. The 2003 amendment deleted "by equitable proceedings" following "may institute an action" in (a)(1).

RESEARCH REFERENCES

Ark. L. Rev. Discovery Procedure in Aid of Judgment, 9 Ark. L. Rev. 390.

Killenbeck, And Then They Did ...? Abusing Equity in the Name of Justice, 44 Ark. L. Rev. 235.

Discovery — Amount of Adversary's Insurance, 9 Ark. L. Rev. 456.

CASE NOTES

ANALYSIS

Construction.

Chose in action.

Complaints.

Jurisdiction.

Liens.

Parties.

Payment.

Public corporation.

Substantial compliance.

Suit for attachment and conversion.

Construction.

"Defendant" designated in language, "or in the court of any county in which the defendant resides, or is summoned," has reference to judgment debtor defendant. *Ritchie Grocer Co. v. Arnold*, 218 Ark. 436, 236 S.W.2d 718 (1951).

Chose in Action.

A "chose in action," as used in subdivision (a)(1) of this section, means, literally, a thing in action, and is the right of bringing an action, or a right to recover a debt or money, or a right of proceeding in a court of law to procure the payment of a sum of money, or a right to recover a personal chattel or a sum of money by action; a chose in action is property, and to deny someone the same violates U.S. Const. Amend. 14. *Agribank, FCB v. Cupples*, 850 F. Supp. 780 (E.D. Ark. 1993).

If there is legal authority in this state to attach a writ of execution to property in general, then that right must also extend to cover choses in action. *Agribank, FCB v. Cupples*, 850 F. Supp. 780 (E.D. Ark. 1993).

Complaints.

Complaint was held to state a cause of action under this section. *Morgan Utils., Inc. v. Perry County*, 183 Ark. 542, 37 S.W.2d 74 (1931).

Jurisdiction.

Chancery court had jurisdiction of cred-

itor's suit based on a foreign judgment against nonresident debtor statutorily served in other state, since judgment at law on the foreign judgment in the state could not be obtained. *Miller v. Maryland Cas. Co.*, 207 Ark. 312, 180 S.W.2d 581 (1944).

Discovery proceeding was not within jurisdiction of chancery court. *Ritchie Grocer Co. v. Arnold*, 218 Ark. 436, 236 S.W.2d 718 (1951).

Order issued by circuit court in action which required an equitable proceeding under this section was reversed and remanded for transfer to chancery court. *Cummings v. Fingers*, 296 Ark. 276, 753 S.W.2d 865 (1988).

Liens.

While a judgment creditor may establish a lien upon the property of an apparently insolvent debtor in the hands of a third party by instituting equitable proceedings to subject the property to the payment of his claim, neither this nor the subsequent sections can give the judgment creditor a prior lien on the property over an existing lien in favor of a third person not made a party to the suit. *N.M. Uri & Co. v. McCroskey*, 135 Ark. 537, 205 S.W. 976 (1918).

Parties.

Proceedings for discovery against third party must be in connection with proceedings against judgment debtor who is indispensable party to suit. *Ritchie Grocer Co. v. Arnold*, 218 Ark. 436, 236 S.W.2d 718 (1951).

When suit is instituted against judgment debtor in proper forum for discovery of his property, third persons indebted to him or holding property in which he has interest may be made parties defendant. *Ritchie Grocer Co. v. Arnold*, 218 Ark. 436, 236 S.W.2d 718 (1951).

Payment.

Order of court that debtor pay into court

a certain sum of money or be in contempt of court was erroneous when made without allegation or proof that debtor had that amount of money in his possession. *Leonard v. State*, 170 Ark. 41, 278 S.W. 654 (1926).

Public Corporation.

Since a county cannot in person make that required oath and is prohibited from doing so by an agent or attorney, it follows that either the answer must be received without oath, or the public corporation was not intended to be liable to the process of garnishment. *Boone County v. Keck*, 31 Ark. 387 (1876).

Substantial Compliance.

This section was held substantially

complied with where sheriff who served execution reported that debtor had no property to satisfy the execution since all his personal property was mortgaged. *Raley v. Mitchell*, 196 Ark. 504, 118 S.W.2d 674 (1938).

Suit for Attachment and Conversion.

Suit by judgment creditor for attachment of property and for conversion, was proceeding for discovery. *Ritchie Grocer Co. v. Arnold*, 218 Ark. 436, 236 S.W.2d 718 (1951).

Cited: *Robinson v. Citizens Bank*, 135 Ark. 308, 204 S.W. 615 (1918); *Arkansas La. Gas Co. v. Luster*, 604 F.2d 31 (8th Cir. 1979).

16-66-419. Discovery in aid of execution — Deposition.

(a) In any action in the circuit courts of this state, in which judgment has been rendered against one (1) or more of the parties therein, a party in whose favor the judgment was rendered or his or her successor in interest when that interest appears of record may, in aid of the judgment or in aid of execution issued thereon, examine any person, including other parties to the action, in the manner provided for taking of depositions for discovery purposes in § 16-44-116 and §§ 16-44-118 — 16-44-120.

(b) The remedies and proceedings provided in this section shall be cumulative and shall be available in addition to all others now provided by law.

(c) This section, being remedial in nature, shall apply to any case in which there is of record a judgment upon which execution may issue, without regard to the date the judgment was entered or the date the action was initiated.

History. Acts 1955, No. 162, §§ 1-3; A.S.A. 1947, §§ 30-906 — 30-908.

A.C.R.C. Notes. The Supreme Court of Arkansas stated in a *Per Curiam* of Nov.

24, 1986, that subsection (a) of this section was deemed superseded by the Arkansas Rules of Civil Procedure.

RESEARCH REFERENCES

Ark. L. Rev. Laurence, An Odd Collection of Topics Relating to Creditors' Remedies Upon Which Various Federal Courts Have Recently Spoken — Rule 69, Rule

13, Federal Tax Liens and the Due Process Rights of Creditors, 37 Ark. L. Rev. 875.

16-66-420. Bill of sale — Delivery of property.

When the purchaser of any goods and chattels pays the purchase money, the officer selling the goods and chattels shall deliver to him or her the property and, if desired, shall execute an instrument in writing

at the expense of the purchaser, testifying to the sale and payment of the purchase money, and conveying to the purchaser all the right, title, and interest which the debtor had in and to the property sold on the day the execution was delivered.

History. Rev. Stat., ch. 60, § 52; C. & M. Dig., § 4342; Pope's Dig., § 5354; A.S.A. 1947, § 30-435.

CASE NOTES

ANALYSIS

Contents of safe.

Contest of sale.

Goods present at sale.

Livestock.

Sale held invalid.

Contents of Safe.

One purchasing a safe under execution is not entitled to its contents. *Ray v. Light*, 34 Ark. 421 (1879).

Contest of Sale.

Anyone in possession may contest the validity of the sale. *Kennedy & Co. v. Clayton*, 29 Ark. 270 (1874).

Goods Present at Sale.

A sale of goods not present at the sale is void. *Kennedy & Co. v. Clayton*, 29 Ark. 270 (1874).

Livestock.

A sale of cattle running at large is void. *Rowan v. Refeld*, 31 Ark. 648 (1877).

Sale Held Invalid.

Where the only notice of sale was the sheriff orally advising debtor that a sale would be held in ten days time, and title was never transferred, the sale was ineffective and the debtor retained an equitable interest in the vehicle. *Garrett v. Walker*, 172 Bankr. 29 (Bankr. E.D. Ark. 1994).

16-66-421. Instrument of conveyance.

(a) The officer who shall sell any real estate or lease of lands for more than three (3) years shall make the purchaser a deed, to be paid for by the purchaser, reciting the names of the parties to the execution, the date when issued, the date of the judgment, order, or decree, and other particulars as recited in the execution and a description of the time, place, and manner of sale. This recital shall be received in evidence of the facts therein stated.

(b)(1) Every officer executing any deed for land, tenements, and hereditaments sold under execution shall acknowledge the deed before the circuit court of the county in which the estate is situated. If the officer dies, leaves the state, resigns, or is removed from office before making the acknowledgment, the deed may be proved before the court as other deeds.

(2) The clerk of the court shall endorse upon the deed a certificate of the acknowledgment or proof, under the seal of the court, and shall make an entry in the minutes of the court of the acknowledgment, with the names of the parties to the suit and a description of the property conveyed by the deed.

(c) Every deed, so executed, acknowledged, or proved shall be recorded as other conveyances of land. Thereafter the deed or a copy thereof or of the record certified by the recorder shall be received in any court in this state without further proof of the execution thereof.

(d) If any officer executes a deed for land, tenements, or hereditaments sold under execution or by virtue of the order, sentence, or decree of any court and the deed is not acknowledged in open court, as provided by law, the deed or deeds of conveyance may be acknowledged or proven before any officer authorized by the laws of this state to take the acknowledgment or proof of deeds of conveyance and recorded as other deeds. The acknowledgment and recordation of the deed shall be as valid as if the deed were acknowledged in open court.

(e) When any officer dies, is removed from office, or is disqualified, after the sale of any property and before executing a conveyance therefor, the purchaser may petition the court out of which the execution issued, stating the facts. If he or she satisfies the court that the purchase money has been paid, the court shall order the sheriff then in office to execute and acknowledge a deed to the purchaser, reciting the facts. The deed shall be executed accordingly and shall have the same effect to all intents and purposes as if made by the officer so deceased, removed from office, or disqualified.

History. Rev. Stat., ch. 60, §§ 54, 56-58, 61; Acts 1855, § 1, p. 81; C. & M. Dig., §§ 4334, 4336-4339, 4359; Pope's Dig., §§ 5346, 5348-5351, 5371; A.S.A. 1947, §§ 30-446 — 30-451.

Publisher's Notes. Subsection (a) may be affected by § 16-66-501.

CASE NOTES

ANALYSIS

Deed void on face.
Evidence of sale.
Timeliness of objection.

evidence that the sale was regularly made, without proof that the sale was confirmed by the court. *Winfrey v. People's Sav. Bank*, 176 Ark. 941, 5 S.W.2d 360 (1928).

Deed Void on Face.

A deed void on its face cannot be reformed. *Landon v. Morris*, 75 Ark. 6, 86 S.W. 672 (1905).

Timeliness of Objection.

The objection that there is no entry in the minutes of the court of the acknowledgment cannot be raised after 35 years. *Williams v. Bennett*, 75 Ark. 312, 88 S.W. 600 (1905).

Evidence of Sale.

A deed to land duly executed and acknowledged by the sheriff and recorded is

16-66-422. Execution of instrument conveying improvements on public land.

The officer who sells any improvement on the public lands of the United States shall, at the expense of the purchaser, execute an instrument in writing reciting the sale, the payment of the purchase money, describing the improvements, and conveying to the purchaser all the right, title, interest, and claim that the debtor had in the improvement at the time execution was levied thereon.

History. Rev. Stat., ch. 60, § 55; C. & M. Dig., § 4335; Pope's Dig., § 5347; A.S.A. 1947, § 30-438.

SUBCHAPTER 5 — REDEMPTION

SECTION.

- 16-66-501. Certificate of sale given purchaser by sheriff — Return of duplicate.
- 16-66-502. Time of redemption of real estate.
- 16-66-503. Manner of making redemption.
- 16-66-504. Right of judgment creditor to redeem — Entry of re-

SECTION.

- demption upon execution book.
- 16-66-505. Redemption from judgment creditor by purchaser.
- 16-66-506. Priority of right of redemption.
- 16-66-507. Conveyance by sheriff — Right to possession.

RESEARCH REFERENCES

ALR. Effect of taking appeal, or staying execution, on right to redeem from execution or judicial sale. 44 ALR 4th 1229.

Am. Jur. 30 Am. Jur. 2d, Exec., § 522 et seq.

C.J.S. 33 C.J.S., Exec., § 253 et seq.

16-66-501. Certificate of sale given purchaser by sheriff — Return of duplicate.

The sheriff shall give the purchaser of any real property, sold upon execution a certificate of sale in which the property sold shall be described and the price for which it is sold stated. The certificate shall be evidence of the purchase at the price stated, and the officer shall return a duplicate thereof with the execution. No conveyance shall be made to the purchaser nor the possession delivered to him or her until the time for redeeming has expired. If the property is redeemed by the defendant as provided in this subchapter, the sale and certificate of purchase shall be null and void.

History. Civil Code, § 693; C. & M. Dig., § 4328; Pope's Dig., § 5340; A.S.A. 1947, § 30-439.

CASE NOTES

Applicability.

This section has no application to a sale under decree of the chancery court though the suit was originally an attachment at

law. *Gray v. Bank of Hartford*, 137 Ark. 232, 208 S.W. 302 (1918), cert. denied, 249 U.S. 608, 39 S. Ct. 290, 63 L. Ed. 800 (1919).

16-66-502. Time of redemption of real estate.

When any real estate or any interest therein is sold under execution, the real estate or interest therein may be redeemed by the debtor from the purchaser or his or her vendees, or the personal representatives of either, within twelve (12) months thereafter.

History. Civil Code, § 691; C. & M. Dig., § 4329; Pope's Dig., § 5341; A.S.A. 1947, § 30-440.

CASE NOTES

ANALYSIS

Construction.
Applicability.
Delivery of purchase money.
Grantees.
Leases.
Property of several defendants.
Purchaser under junior lien.

Construction.

This section should be liberally construed. *Rose v. Loughborough*, 182 Ark. 782, 32 S.W.2d 1066 (1930).

Applicability.

This section applies to redemptions where land was sold under judgment sustaining attachment. *Beard v. Wilson*, 52 Ark. 290, 12 S.W. 567 (1889).

Delivery of Purchase Money.

When a stranger to the suit becomes the purchaser at an execution sale of real estate the sheriff is required to deliver the purchase money to the execution creditor when it is received and is not permitted to wait until the time for redemption of the judgment debtor has expired. *Fort Smith*

Seed Co. v. Jones, 198 Ark. 1012, 132 S.W.2d 364 (1939).

Grantees.

Grantees of a judgment debtor are entitled to redeem. *Arkansas Nat'l Bank v. Price*, 179 Ark. 259, 15 S.W.2d 396 (1929).

Leases.

A leasehold for farming purposes is not within the meaning of this statute. *Munson v. Wade*, 174 Ark. 880, 298 S.W. 25 (1927).

Property of Several Defendants.

Execution creditor is not permitted to have property of various defendants sold in bulk and thus embarrass a judgment debtor in exercising his right to redeem his land. *Vaughan v. Screeton*, 183 Ark. 816, 39 S.W.2d 299 (1931).

Purchaser under Junior Lien.

The purchaser at the execution sale under a junior lien may redeem the land from the purchaser at the execution sale under the senior lien. *Dalton v. Brown*, 130 Ark. 200, 197 S.W. 32 (1917).

Cited: *United States v. Weir*, 235 F. Supp. 306 (E.D. Ark. 1963), *aff'd*, 339 F.2d 82 (8th Cir. 1964).

16-66-503. Manner of making redemption.

The debtor may at any time within twelve (12) months pay to the clerk of the court from which the execution issued the purchase money with fifteen percent (15%) per annum and all lawful charges and take his or her receipt therefor. The money shall be held by the clerk for the use of the purchaser. The clerk shall be responsible upon his official bond therefor. The clerk shall endorse upon the execution book that the redemption has been made.

History. Civil Code, § 692; C. & M. Dig., § 4330; Pope's Dig., § 5342; A.S.A. 1947, § 30-441.

CASE NOTES

ANALYSIS

Credit for surplus.
Equity.

Credit for Surplus.

Where an execution debtor seeks to redeem his homestead from a sale under an execution to which it is subject, he is not entitled to a credit on the purchase money for the surplus applied to pay off another execution to which the homestead was not subject. *Simpson v. Biffle*, 63 Ark. 289, 38 S.W. 345 (1896).

Equity.

This section is not applicable to a sale in chancery. *Gray v. Bank of Hartford*, 137 Ark. 232, 208 S.W. 302 (1918), cert. denied, 249 U.S. 608, 39 S. Ct. 290, 63 L. Ed. 800 (1919).

An injunction will not lie to prevent redemption. *Arkansas Nat'l Bank v. Price*, 179 Ark. 259, 15 S.W.2d 396 (1929).

Cited: *Kelly v. Weir*, 243 F. Supp. 588 (E.D. Ark. 1965).

16-66-504. Right of judgment creditor to redeem — Entry of redemption upon execution book.

(a) At any time before the expiration of twelve (12) months from the sale of any land under the provisions of this subchapter which has not been redeemed, any judgment creditor may redeem the land in the manner set forth in subsection (b) of this section.

(b)(1) The judgment creditor shall:

(A) Sue out an execution upon his or her judgment and place the execution in the hands of the proper officer;

(B) Pay to the officer the amount for which the premises were sold, and fifteen percent (15%) per annum thereon from the date of the sale, and all charges thereon for the use of the purchaser; and

(C) Offer to credit his or her execution with a sum at least equal to ten percent (10%) of the amount for which the land sold, which offer shall be regarded as his or her bid.

(2) All of which shall be endorsed upon the execution, and a statement thereof filed with the execution upon which the land was sold. Whereupon, the clerk shall endorse in the proper place upon the execution book that the creditor has bid for the redemption of the property, which shall be dated, and may be in substance as follows:

"A. B., a judgment creditor, bids . . . dollars, for the redemption of the property sold on this execution."

History. Civil Code, § 694; C. & M. Dig., § 4331; Pope's Dig., § 5343; A.S.A. 1947, § 30-442.

RESEARCH REFERENCES

Ark. L. Rev. Rights of Junior Claimants to Encumbered Property, 7 Ark. L. Rev. 326.

CASE NOTES

Payment to Sheriff.

Payment should be made to the sheriff, and not to the clerk. Edgewood Distilling

Co. v. Rugg, 98 Ark. 589, 136 S.W. 977 (1911).

16-66-505. Redemption from judgment creditor by purchaser.

(a) Unless the purchaser, within thirty (30) days from the filing of the statement and the making of the endorsement mentioned in § 16-66-504, pays to the officer the amount so bid by the judgment creditor, the endorsement shall operate as a redemption of the property by the judgment creditor and he or she shall succeed to all the rights and liabilities of the purchaser.

(b) If the purchaser pays within the time allowed the amount so bid by the judgment creditor to the officer, it shall bar the redemption. The right of redemption of the judgment creditor as against the purchaser or anyone redeeming from him or her shall be forever foreclosed.

(c)(1) If the purchaser fails to pay over to the officer the amount of the bid as provided in this section, the officer shall pay over to the purchaser the amount so paid by the judgment creditor and credit the execution of the judgment creditor with the amount so bid by him or her, after deducting costs and commissions, and shall execute to the judgment creditor a certificate of sale, in which shall be included as the price paid the amount paid to the purchaser and the amount of the bid of the judgment creditor.

(2) The judgment creditor shall for all purposes of this subchapter be regarded as the purchaser of the property at the price mentioned in the certificate of sale executed to him or her.

(d) Any other judgment creditor may in the same manner redeem from the judgment creditor or each succeeding judgment creditor who may redeem under the provisions of this section.

(e) No redemption shall be allowed after twelve (12) months from the day of the original sale.

History. Civil Code, § 695; C. & M. Dig., § 4332; Pope's Dig., § 5344; A.S.A. 1947, § 30-443.

16-66-506. Priority of right of redemption.

If any purchaser pays the amount bid by the judgment creditor, the officer shall pay that amount to the judgment creditor, together with the amount paid by the judgment creditor to the officer. The right of redemption shall be in the order of priority of judgment, but if any judgment creditor for thirty (30) days after a sale or redemption upon a judgment prior to his or hers fails to pay off prior bids and fails to bid for the redemption of the property, as provided in this subchapter, he or she shall be deemed to have waived his or her priority, as against others who have complied with the provisions of this subchapter.

History. Civil Code, § 696; C. & M. Dig., § 4333; Pope's Dig., § 5345; A.S.A. 1947, § 30-444.

CASE NOTES

Payment to Sheriff.

The payment under this section is to be made to the sheriff and not to the clerk.

Edgewood Distilling Co. v. Rugg, 98 Ark. 589, 136 S.W. 977 (1911).

16-66-507. Conveyance by sheriff — Right to possession.

(a) After the time for redemption has expired, the sheriff or his or her successor shall convey by deed the property sold under the provisions of this subchapter to the person entitled thereto.

(b) Upon the conveyance, the grantee, if possession is not delivered within ten (10) days, may proceed by forcible detainer to be put in possession thereof.

History. Civil Code, § 697; C. & M. §§ 5346, 5352, 6038; A.S.A. 1947, § 30-Dig., §§ 4334, 4340, 4841; Pope's Dig., 445.

CASE NOTES

ANALYSIS

Ejectment.
Equity.

Ejectment.

This section does not provide an exclusive remedy so as to prevent an action in ejectment. *Austin v. Huie*, 181 Ark. 412, 26 S.W.2d 87 (1930).

Equity.

This section is not binding as to procedure upon a court of equity. *Gray v. Bank of Hartford*, 137 Ark. 232, 208 S.W. 302 (1918), cert. denied, 249 U.S. 608, 39 S. Ct. 290, 63 L. Ed. 800 (1919).

SUBCHAPTER 6 — UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT

SECTION.

- 16-66-601. Definition.
- 16-66-602. Filing and status of foreign judgments.
- 16-66-603. Notice of filing.
- 16-66-604. Stay.
- 16-66-605. Fees.

SECTION.

- 16-66-606. Optional procedure.
- 16-66-607. Uniformity of interpretation.
- 16-66-608. Short title.
- 16-66-609, 16-66-610. [Reserved.]
- 16-66-611 — 16-66-619. [Repealed.]

Publisher's Notes. Some provisions of this subchapter may be superseded by the Arkansas Rules of Civil Procedure, the Rules of Appellate Procedure and the Rules for Inferior Courts pursuant to the Supersession Rule adopted by the Su-

preme Court of Arkansas in its order of December 18, 1978.

Former subchapter 6, concerning the Uniform Enforcement of Foreign Judgments Act, was repealed by Acts 1989, No. 501, § 9. The former subchapter was de-

rived from the following sources:

- 16-66-601. Acts 1949, No. 34, § 1;
A.S.A. 1947, § 29-801.
- 16-66-602. Acts 1949, No. 34, § 2;
A.S.A. 1947, § 29-802.
- 16-66-603. Acts 1949, No. 34, § 3;
A.S.A. 1947, § 29-803.
- 16-66-604. Acts 1949, No. 34, § 4;
A.S.A. 1947, § 29-804.
- 16-66-605. Acts 1949, No. 34, § 5;
A.S.A. 1947, § 29-805.
- 16-66-606. Acts 1949, No. 34, § 6;
A.S.A. 1947, § 29-806.
- 16-66-607. Acts 1949, No. 34, § 7;
A.S.A. 1947, § 29-807.
- 16-66-608. Acts 1949, No. 34, § 8;
A.S.A. 1947, § 29-808.
- 16-66-609. Acts 1949, No. 34, § 9;
A.S.A. 1947, § 29-809.
- 16-66-610. Acts 1949, No. 34, § 10;
A.S.A. 1947, § 29-810.
- 16-66-611. Acts 1949, No. 34, § 11;
A.S.A. 1947, § 29-811.
- 16-66-612. Acts 1949, No. 34, § 12;
A.S.A. 1947, § 29-812.
- 16-66-613. Acts 1949, No. 34, § 13;
A.S.A. 1947, § 29-813.
- 16-66-614. Acts 1949, No. 34, § 14;
A.S.A. 1947, § 29-814.
- 16-66-615. Acts 1949, No. 34, § 15;
A.S.A. 1947, § 29-815.
- 16-66-616. Acts 1949, No. 34, § 16;
A.S.A. 1947, § 29-816.
- 16-66-617. Acts 1949, No. 34, § 17;
A.S.A. 1947, § 29-817.
- 16-66-618. Acts 1949, No. 34, § 18;
A.S.A. 1947, § 29-818.

16-66-619. Acts 1949, No. 34, § 19;
A.S.A. 1947, § 29-818n.

For Comments regarding the Uniform Enforcement of Foreign Judgments Act, see Commentaries Volume B.

Effective Dates. Acts 1989, No. 501, § 10: Mar. 13, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that the version of the Uniform Enforcement of Foreign Judgments Act adopted as Act 34 of 1949 is inadequate and out of date and it should be replaced by the Revised Uniform Enforcement of Foreign Judgments Act recommended in 1964. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1989 (3rd Ex. Sess.), No. 74, § 6: Nov. 16, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that the Uniform Enforcement of Foreign Judgments Act is in immediate need of technical corrections; that this Act makes such technical corrections; and that this Act should go into effect immediately in order that the correct law become effective as soon as possible. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Validity, construction, and application of Uniform Enforcement of Foreign Judgments Act. 31 ALR 4th 706.

Ark. L. Notes. Watkins, Procedural Notes from All Over, 1989 Ark. L. Notes 65.

Ark. L. Rev. Acts 1949 General Assembly — Act 34, The New Uniform Foreign Judgments Act, 3 Ark. L. Rev. 402.

Constitutional Law — Prejudgment Garnishment of Wages, 23 Ark. L. Rev. 660.

CASE NOTES

ANALYSIS

Constitutionality.
Purpose.
Applicability.
Child support.
Collateral attack.
Form of judgment.
Jurisdiction.

Constitutionality.

Former subchapter was constitutional and applicable to a judgment or decree awarding child support to be paid in regular periodic installments and the propriety of enforcement of that decree in the state where it was registered. *Holley v. Holley*, 264 Ark. 35, 568 S.W.2d 487 (1978) (decision under prior law).

Purpose.

The primary purpose of former subchapter was to provide a summary judgment procedure in which a party in whose favor a judgment had been rendered may enforce that judgment promptly in any jurisdiction where the judgment debtor could be found, thereby enabling the judgment creditor to obtain relief in an expeditious manner. *Dolin v. Dolin*, 9 Ark. App. 329, 659 S.W.2d 954 (1983) (decision under prior law).

This subchapter provides a summary procedure in which a party in whose favor a judgment has been rendered may enforce that judgment promptly in any jurisdiction where the judgment debtor can be found, thereby enabling the judgment creditor to obtain relief in an expeditious manner. *Chemical Methods Leasco, Inc. v. Ellison*, 46 Ark. App. 288, 879 S.W.2d 467 (1994).

Applicability.

Former subchapter was applicable to a judgment or decree awarding child support to be paid in regular periodic installments and the propriety of enforcement of that decree in the state where it was registered. *Holley v. Holley*, 264 Ark. 35, 568 S.W.2d 487 (1978) (decision under prior law).

This subchapter requires only that the foreign judgment be regular on its face and duly authenticated to be subject to registration. *Chemical Methods Leasco, Inc. v. Ellison*, 46 Ark. App. 288, 879 S.W.2d 467 (1994).

Child Support.

Foreign child-support judgments and accompanying writs of garnishment were

recognized and enforced by Arkansas courts under former subchapter and the Uniform Reciprocal Enforcement of Support Act, § 9-14-301 et seq. (repealed). *Walsh v. Wal-Mart Stores, Inc.*, 836 F.2d 1152 (8th Cir. 1988) (decision under prior law).

Collateral Attack.

Under the full faith and credit clause of the United States Constitution, a foreign judgment is a conclusive on collateral attack, except for defenses of fraud in the procurement or want of jurisdiction in the rendering court, as a domestic judgment would be. *Strick Lease, Inc. v. Juels*, 30 Ark. App. 15, 780 S.W.2d 594 (1989).

Under the Full Faith and Credit Clause of the United States Constitution, a foreign judgment is as conclusive on collateral attack as a domestic judgment would be, except for the defenses of fraud in the procurement or want of jurisdiction in the rendering court. *May v. May*, 57 Ark. App. 215, 944 S.W.2d 550 (1997).

Form of Judgment.

This subchapter requires only that the foreign judgment be regular on its face and duly authenticated to be subject to registration. *Strick Lease, Inc. v. Juels*, 30 Ark. App. 15, 780 S.W.2d 594 (1989).

Jurisdiction.

Foreign judgments are presumed valid, and an answer asserting lack of jurisdiction is not evidence of the fact; the burden of proving it is on the one attacking the foreign judgment. *Strick Lease, Inc. v. Juels*, 30 Ark. App. 15, 780 S.W.2d 594 (1989).

16-66-601. Definition.

In this subchapter, "foreign judgment" means any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state.

History. Acts 1989, No. 501, § 1.

RESEARCH REFERENCES

Ark. L. Rev. Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313.

CASE NOTES

Cited: *Stephens v. Walker*, 743 F. Supp. 670 (W.D. Ark. 1990).

16-66-602. Filing and status of foreign judgments.

A copy of any foreign judgment authenticated in accordance with the act of Congress or the statutes of this state may be filed in the office of the clerk of any court of this state having jurisdiction of such an action. The clerk shall treat the foreign judgment in the same manner as a judgment of a court in this state. A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a court of this state and may be enforced or satisfied in like manner.

History. Acts 1989, No. 501, § 2; 1989 (3rd Ex. Sess.), No. 74, § 1.

CASE NOTES

ANALYSIS

Purpose.
Collateral defenses.
Entitlement to registration.
Failure to register.
Future payments.
Proper registration accepted.
Protection from collateral attack.
Registration improper.
Relitigation prohibited.
Res judicata.
Summary judgment.

Purpose.

The primary purpose of this section is to provide a summary judgment procedure in which a party in whose favor a judgment has been rendered may enforce that judgment promptly in any jurisdiction where the judgment debtor can be found, thereby enabling the judgment creditor to obtain relief in an expeditious manner. *McDermott v. Great Plains Equip. Leasing Corp.*, 40 Ark. App. 8, 839 S.W.2d 547 (1992); *Chemical Methods Leasco, Inc. v. Ellison*, 46 Ark. App. 288, 879 S.W.2d 467 (1994).

This subchapter requires only that the foreign judgment be regular on its face and duly authenticated to be subject to registration. *Chemical Methods Leasco, Inc. v. Ellison*, 46 Ark. App. 288, 879 S.W.2d 467 (1994).

Collateral Defenses.

Defenses which are raised for a purpose

other than to impeach, modify or overturn a judgment, i.e., which are collateral, may not be raised in the registration proceeding. *Purser v. Corpus Christi State Nat'l Bank*, 256 Ark. 452, 508 S.W.2d 549 (1974), and, 258 Ark. 54, 522 S.W.2d 187 (1975) (decision to prior law).

Entitlement to Registration.

Where an out-of-state decree was regular on its face and recited all requisite jurisdictional facts, the decree was properly authenticated and entitled to registration; it could thereafter be attacked only on grounds of fraud in the procurement of it or want of jurisdiction. *Dolin v. Dolin*, 9 Ark. App. 329, 659 S.W.2d 954 (1983) (decision under prior law).

Failure to Register.

Where foreign court issued a judgment in favor of the judgment debtor on its counterclaim against the creditor, but the debtor did not ask the court to register the judgment in its favor, the trial court will not be reversed for failure to award relief for which no request was made. *Monark Boat Co. v. Fischer*, 292 Ark. 544, 732 S.W.2d 123 (1987) (decision under prior law).

Future Payments.

While some jurisdictions do not favor registration of a foreign decree requiring future payments, such as alimony or child support, this state favors that view; oth-

erwise, parties could never, as a practical matter, enforce judgments and decrees if one party left the state of original jurisdiction. *Nehring v. Taylor*, 266 Ark. 253, 583 S.W.2d 56 (1979) (decision under prior law).

Proper Registration Accepted.

Once a decree or judgment is accepted as proper for registration, then it becomes in effect an Arkansas judgment, and will remain on the judgment books to be enforced by Arkansas in the future. *Nehring v. Taylor*, 266 Ark. 253, 583 S.W.2d 56 (1979) (decision under prior law).

Protection From Collateral Attack.

Foreign judgments, regardless of whether entered by default, are protected against collateral attack by the full faith and credit clause of U.S. Const., Art. IV, § 1, unless the defenses of fraud in the procurement or want of jurisdiction in the rendering court can be established. *Butler Fence Co. v. Acme Fence & Iron Co.*, 42 Ark. App. 30, 852 S.W.2d 826 (1993).

Registration Improper.

The trial court erred in permitting the registration of the lessor's foreign judgment where the other state's long-arm statute was not strictly complied with, and the lessee was not subject to the personal jurisdiction of the other state. *Bi-State Energy, Inc. v. Tidewater Compression, Inc.*, 19 Ark. App. 148, 718 S.W.2d 117 (1986) (decision under prior law).

16-66-603. Notice of filing.

(a) At the time of the filing of the foreign judgment, the judgment creditor or his or her lawyer shall make and file with the clerk of court an affidavit setting forth the name and last known post office address of the judgment debtor, and the judgment creditor.

(b) Promptly upon the filing of the foreign judgment and the affidavit, the clerk shall mail notice of the filing of the foreign judgment to the judgment debtor at the address given and shall make a note of the mailing in the docket. The notice shall include the name and post office address of the judgment creditor and the judgment creditor's lawyer, if any, in this state. In addition, the judgment creditor may mail a notice of the filing of the judgment to the judgment debtor and may file proof of mailing with the clerk. Lack of mailing notice of filing by the clerk shall not affect the enforcement proceedings if proof of mailing by the judgment creditor has been filed.

Relitigation Prohibited.

Former statute did not permit the relitigation of any issue finally determined in the foreign court, for those matters are foreclosed. *Dolin v. Dolin*, 9 Ark. App. 329, 659 S.W.2d 954 (1983) (decision under prior law).

Res Judicata.

The decision of the foreign court that it had jurisdiction of the judgment debtor was binding on it, and while it could have appealed that decision, it could not attack it in a collateral proceeding because of the doctrine of res judicata. *Monark Boat Co. v. Fischer*, 292 Ark. 544, 732 S.W.2d 123 (1987) (decision under prior law).

Where the plaintiff contested personal jurisdiction in a Texas court and did not appeal that determination, the Texas court's finding that it had personal jurisdiction is res judicata and is not subject to collateral attack. *May v. May*, 57 Ark. App. 215, 944 S.W.2d 550 (1997).

Summary Judgment.

Trial court's premature ruling on motion for summary judgment where same jurisdictional question had been resolved in foreign court was not prejudicial to defendant in judgment registration proceeding. *Purser v. Corpus Christi State Nat'l Bank*, 258 Ark. 54, 522 S.W.2d 187 (1975) (decision under prior law).

Cited: *Amant v. Callahan*, 341 Ark. 857, 20 S.W.3d 896 (2000).

(c) No execution or other process for enforcement of a foreign judgment filed hereunder shall issue until ten (10) days after the date the judgment is filed.

History. Acts 1989, No. 501, § 3.

16-66-604. Stay.

(a) If the judgment debtor shows the court that an appeal from the foreign judgment is pending or will be taken, or that a stay of execution has been granted, the court shall stay enforcement of the foreign judgment until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated, upon proof that the judgment debtor has furnished the security for the satisfaction of the judgment required by the state in which it was rendered.

(b) If the judgment debtor shows the court any ground upon which enforcement of a judgment of a court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period, upon requiring the same security for satisfaction of the judgment which is required in this state.

History. Acts 1989, No. 501, § 4; 1989 (3rd Ex. Sess.), No. 74, § 2.

16-66-605. Fees.

Any person filing a foreign judgment shall pay to the clerk of court the same filing fee that would be paid for the filing of a civil action. Fees for docketing, transcription, or other enforcement proceedings shall be as provided in other civil proceedings in the courts of this state.

History. Acts 1989, No. 501, § 5; 1989 (3rd Ex. Sess.), No. 74, § 3.

16-66-606. Optional procedure.

The right of a judgment creditor to bring an action to enforce his judgment instead of proceeding under this subchapter remains unimpaired.

History. Acts 1989, No. 501, § 6.

16-66-607. Uniformity of interpretation.

This subchapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History. Acts 1989, No. 501, § 7.

16-66-608. Short title.

This subchapter may be cited as the “Uniform Enforcement of Foreign Judgments Act”.

History. Acts 1989, No. 501, § 8.

16-66-609, 16-16-610. [Reserved.]

A.C.R.C. Notes. Section 9 of the Uniform Enforcement of Foreign Judgments Act is a repeal provision; Section 10 concerns the effective date. Acts 1989, No. 501, § 10, makes the act effective March 13, 1989.

16-66-611 — 16-66-619. [Repealed.]

Publisher’s Notes. As to repeal of these sections, see note at beginning of subchapter.

CHAPTER 67

APPEAL

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. APPEAL TO CIRCUIT COURT.
3. APPEAL TO SUPREME COURT.

Publisher’s Notes. Some provisions of this chapter may be superseded by the Arkansas Rules of Civil Procedure, Rules of Appellate Procedure, and Rules for Inferior Courts pursuant to the Supersession Rule adopted by the Supreme Court of Arkansas in its order of December 18, 1978.

RESEARCH REFERENCES

ALR. Appealability of state court’s order granting or denying motion to disqualify attorney. 5 ALR 4th 1251.
Running of interest on judgment where both parties appeal. 11 ALR 4th 1099.
Effect of death of party to divorce proceeding pending appeal or time allowed for appeal. 33 ALR 4th 47.

Am. Jur. 4 Am. Jur. 2d, A & E, § 1 et seq.
Ark. L. Rev. Arkansas’ Judiciary: Its History and Structure, 18 Ark. L. Rev. 152.
C.J.S. 4 C.J.S., A & E, § 1 et seq.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

16-67-101. Time for filing notice of appeal.

16-67-101. Time for filing notice of appeal.

Time for filing a notice of appeal shall commence upon the filing and entry of record of the judgment, order, or decree pursuant to Rule 4 of the Arkansas Rules of Appellate Procedure.

History. Acts 1989 (3rd Ex. Sess.), No. 98, § 2.

RESEARCH REFERENCES

UALR L.J. Survey, Civil Procedure, 12 UALR L.J. 603.

SUBCHAPTER 2 — APPEAL TO CIRCUIT COURT

SECTION.

- 16-67-201. [Superseded.]
- 16-67-202. Bond on appeal.
- 16-67-203. Transmission of original papers to circuit court.
- 16-67-204. Notice of appeal.
- 16-67-205. Time of trial of appeal.
- 16-67-206. Jurisdiction for final judgment in trials de novo or appeals.

SECTION.

- 16-67-207. Appeal tried de novo.
- 16-67-208. Defense of appeals — Costs.
- 16-67-209. Interest allowed on allowances wrongfully obtained.

Cross References. Allowances, appeals, Ark. Const., Art. 7, § 51.

Contests for public offices, appeals, Ark. Const., Art. 7, § 52.

Writs of certiorari, issuance by circuit court, § 16-13-205.

Effective Dates. Acts 1873, No. 31, § 30: effective on passage.

Acts 1883, No. 27, § 7: effective on passage.

Acts 1965, No. 382, § 3: Mar. 19, 1965. Emergency clause provided: "It is hereby found and declared by the General Assembly of the State of Arkansas that it is

desirable that the final orders and judgments of county courts should be conclusive unless questioned by appeal filed promptly after such final orders and judgments are entered, and that it is in the public interest that the period for filing appeals from all final orders and judgments of county courts be standardized and limited to thirty (30) days. It is, therefore, declared that an emergency exists, and this Act being necessary for the preservation of the public peace, health and safety shall take effect and be in force from and after its passage and approval."

CASE NOTES

Cited: Garland County Bd. of Election Comm'rs v. Ennis, 227 Ark. 880, 302 S.W.2d 76 (1957); Parker v. Rowan, 239 Ark. 929, 395 S.W.2d 338 (1965); Skinner v. Mayfield, 246 Ark. 741, 439 S.W.2d 651

(1969); Greig v. Crawford County, 256 Ark. 202, 506 S.W.2d 523 (1974); Horton v. McConnell, 256 Ark. 84, 506 S.W.2d 540 (1974); Mears v. Hall, 263 Ark. 827, 569 S.W.2d 91 (1978).

16-67-201. [Superseded.]

Publisher's Notes. This section was superseded by Inferior Court Rule 9 [now

District Court Rule 9] with respect to appeals from a county court order involv-

ing a property assessment adjustment. See *Pike Ave. Dev. Co. v. Pulaski County*, 343 Ark. 338, 37 S.W.3d 177 (2001). The section was derived from Acts 1883, No.

27, § 1, p. 48; C. & M. Dig., § 2287; Pope's Dig., § 2913; Acts 1965, No. 382, § 1; A.S.A. 1947, § 27-2001.

16-67-202. Bond on appeal.

Where an appeal is taken by any person in cases of allowances made for or against counties, he or she shall give a bond, payable to the proper county, conditioned to prosecute the appeal and save the county from all costs on account of the appeal being taken.

History. Acts 1883, No. 27, § 2, p. 48; C. & M. Dig., § 2288; Pope's Dig., § 2914; A.S.A. 1947, § 27-2002.

CASE NOTES

ANALYSIS

Amendment.
Disallowance of claim.
Insufficiency of bond.
Presumption.

Amendment.

A bond for appeal to the circuit court in proper form, though not signed by sureties, was subject to amendment. *Fairview School Dist. No. 7 v. Mammoth Spring School Dist. No. 2*, 189 Ark. 74, 70 S.W.2d 502 (1934).

Disallowance of Claim.

Where a claim against a county was disallowed and the claimant appealed to the circuit court, no appeal bond was

necessary since this section requires a bond only in appeals for allowances made for or against counties. *Franklin County v. Smith*, 178 Ark. 666, 11 S.W.2d 446 (1928).

Insufficiency of Bond.

The insufficiency of bond may be waived. *Stricklin v. Galloway*, 99 Ark. 56, 137 S.W. 804 (1911).

Presumption.

Where a bond on appeal from the county court appears without a filing mark in the transcript of the proceedings, it will be presumed on appeal that the bond was left with the county clerk for filing. *Fairview School Dist. No. 7 v. Mammoth School Dist. No. 2*, 189 Ark. 74, 70 S.W.2d 502 (1934).

16-67-203. Transmission of original papers to circuit court.

In all appeals to the circuit court from all judgments and orders of the county court, the clerk of the county court shall transmit all of the original papers and a transcript of the record entry in the cause or matter to the clerk of the circuit court. He or she shall take his or her receipt therefor and file the receipt in place of the original papers.

History. Acts 1883, No. 27, § 3, p. 48; C. & M. Dig., § 2289; Pope's Dig., § 2915; A.S.A. 1947, § 27-2003.

CASE NOTES

ANALYSIS

Duty of clerk.
Filing of papers.

Perfection of appeal.

Duty of Clerk.

It is the duty of the county clerk to obey

the order of the circuit court directing him to transmit the original papers in a cause appealed from the county to the circuit court, though he had been ordered by the county court not to do so; and if in so doing he should be adjudged guilty of contempt by the county court, such judgment would be void. *Jones v. Coffin*, 96 Ark. 332, 131 S.W. 873 (1910).

Filing of Papers.

When there is a delay after the first day of the term in filing the transcript, it becomes a matter of discretion with the trial court whether the appeal may be prosecuted. *Briner v. Holleman*, 115 Ark. 213, 170 S.W. 1010 (1914).

This section is directory only, the circuit court may use its discretion in determin-

ing whether there has been unnecessary or prejudicial delay in filing a transcript of the county court proceedings. *Woollard v. Circuit Court*, 222 Ark. 287, 258 S.W.2d 886 (1953).

The circuit court did not abuse its discretion in allowing an appeal where the original papers were not filed before the trial date, inasmuch as certified copies had been filed and there was no showing of prejudice. *Woollard v. Circuit Court*, 222 Ark. 287, 258 S.W.2d 886 (1953).

Perfection of Appeal.

It is the duty of the appellant or the appellant's counsel, not the court clerk, to perfect an appeal. *Taylor v. Jefferson County Dep't of Social Servs.*, 18 Ark. App. 206, 712 S.W.2d 332 (1986).

16-67-204. Notice of appeal.

If the appeal is not granted at the term at which the judgment or order is rendered or the appellee does not enter his or her appearance in the circuit court, he or she shall be summoned, actually or constructively, as provided by law for the service of a summons, to appear and answer the appeal.

History. Acts 1883, No. 27, § 5, p. 48; C. & M. Dig., § 2291; Pope's Dig., § 2917; A.S.A. 1947, § 27-2005.

16-67-205. Time of trial of appeal.

All appeals granted ten (10) days before the commencement of any term of the circuit court, next after the appeal is allowed shall be tried and determined at such terms unless continued for cause.

History. Acts 1883, No. 27, § 4, p. 48; C. & M. Dig., § 2290; Pope's Dig., § 2916; A.S.A. 1947, § 27-2004.

CASE NOTES

Delay in Filing.

This section is directory only, the circuit court may use its discretion in determining whether there has been unnecessary

or prejudicial delay in filing a transcript of the county court proceedings. *Woollard v. Circuit Court*, 222 Ark. 287, 258 S.W.2d 886 (1953).

16-67-206. Jurisdiction for final judgment in trials de novo or appeals.

In all cases of trials de novo, or of appeals from inferior courts, the circuit courts shall have or retain jurisdiction of the subject matter for final judgment in the same manner and to the same extent as though

original jurisdiction had been conferred on the circuit courts by law, notwithstanding that the amount in controversy may be lesser or greater than that found in the court below.

History. Chapters of Digest 1869, § 5, p. 109; C. & M. Dig., § 2236; Pope's Dig., § 2864; A.S.A. 1947, § 27-2007.

Cross References. Circuit courts to retain jurisdiction for final judgment, § 16-13-212.

CASE NOTES

ANALYSIS

Authority of court.
Jurisdictional amount.
New issues.
Statute of limitations.
Trial de novo.

Authority of Court.

On appeal, the circuit court was within the bounds of its authority when it disregarded a void amendment allowed by the county court in the annexation proceeding and heard the case on the original petition, as if it had been originally brought in the circuit court, and as if no amendment had been made. *Rooker v. City of Little Rock*, 234 Ark. 372, 352 S.W.2d 172 (1962).

Jurisdictional Amount.

The circuit court cannot on appeal render judgment for amount exceeding justice's jurisdiction. *Norman v. Fife*, 61 Ark. 33, 31 S.W. 740 (1895); *Morgan v. St.*

Louis, I.M. & S. Ry., 106 Ark. 74, 152 S.W. 1023 (1912).

New Issues.

The circuit court, after a trial in county court, may permit amendments and new issues to be raised, excepting set off and a new cause of action. *Armstrong v. Harrell*, 279 Ark. 24, 648 S.W.2d 450 (1983).

Statute of Limitations.

Defendant may, in the circuit court, plead the statute of limitations. *Meddock v. Williams*, 91 Ark. 93, 120 S.W. 842 (1909).

Trial De Novo.

It was error for the circuit court to dismiss an action in which the county court granted plaintiff an easement across defendant's lands to the highway, as it should have retained jurisdiction and tried the case de novo. *Armstrong v. Cook*, 243 Ark. 230, 419 S.W.2d 308 (1967).

Cited: *Castleman v. Dumas*, 279 Ark. 463, 652 S.W.2d 629 (1983).

16-67-207. Appeal tried de novo.

The circuit court shall proceed to try all appeals from county courts de novo as other cases at law.

History. Acts 1883, No. 27, § 6, p. 48; C. & M. Dig., § 2292; Pope's Dig., § 2918; A.S.A. 1947, § 27-2006.

CASE NOTES

ANALYSIS

Dismissal.
Duty of court.
Effect of appeal.
Eminent domain damages.

Dismissal.

Where plaintiff's tort claim against county was denied by county judge and plaintiff sought a de novo review in the

circuit court in accordance with this section, the circuit judge held the provisions of § 21-9-301 immunized the county from the tort claim and properly dismissed the claim. The circuit court thus did, in the de novo review pursuant to this section, exactly as it would have had to do if the case had been brought "as other cases at law." *Bigelow v. Union County*, 287 Ark. 486, 701 S.W.2d 125 (1985).

Duty of Court.

On appeal from county court it was duty of circuit court to hear evidence that either side desired to present, if however, testimony was in the transcript on appeal to the circuit court and if no other evidence is presented in the circuit court, the circuit court should make its decision on the same testimony and pleadings that were presented in the county court. *Garland County Bd. of Election Comm'rs v. Ennis*, 227 Ark. 880, 302 S.W.2d 76 (1957).

It was error for the circuit court to dismiss an action in which the county court granted plaintiff an easement across defendant's lands to the highway, as it should have retained jurisdiction and tried the case de novo. *Armstrong v. Cook*, 243 Ark. 230, 419 S.W.2d 308 (1967).

Effect of Appeal.

By appeal the cause is transferred to the circuit court to be tried de novo just as if brought there in the first instance. *Dod-*

son v. Mayor of Ft. Smith, 33 Ark. 508 (1878); *Phillips County v. Lee County*, 34 Ark. 240 (1879); *Marion County v. Estes*, 79 Ark. 504, 96 S.W. 165 (1906); *City of Batesville v. Ball*, 100 Ark. 496, 140 S.W. 712 (1911).

Eminent Domain Damages.

Eminent domain damages can be fixed or readjusted upon conditions occurring subsequent to trial and before judgment by the circuit court since it tries appeals from the county court de novo. *Pulaski County v. Horton*, 224 Ark. 864, 276 S.W.2d 706 (1955).

Cited: *Watts & Sanders v. Myatt*, 216 Ark. 660, 226 S.W.2d 800 (1950); *Bowden v. Oates*, 248 Ark. 577, 452 S.W.2d 831 (1970); *Union County v. Union County Election Comm'n*, 274 Ark. 286, 623 S.W.2d 827 (1981); *Cox v. Farrell*, 292 Ark. 177, 728 S.W.2d 954 (1987); *Potlatch Corp. v. Arkansas City Sch. Dist.*, 311 Ark. 145, 842 S.W.2d 32 (1992).

16-67-208. Defense of appeals — Costs.

In cases when appeals are prosecuted in the circuit court or Supreme Court, the judge of the county court shall defend the appeal. All expenses or money paid out by reason of the defense shall be repaid by the proper county by order of the county court.

History. Acts 1873, No. 31, § 28, p. 53; C. & M. Dig., § 2293; Pope's Dig., § 2919; A.S.A. 1947, § 27-2008.

CASE NOTES**ANALYSIS**

Appeal by county judge.
Attack by successor judge.
Jurisdiction.

Appeal by County Judge.

County judge may appeal from circuit court on behalf of the county. *Ouachita County v. Rolland*, 60 Ark. 516, 31 S.W. 144 (1895). But see *Pulaski County v. Jacuzzi Bros.*, 317 Ark. 10, 875 S.W.2d 496 (1994).

Attack by Successor Judge.

This section was not violated when the county judge joined in an attack in the circuit court on appeal from an allowance against the county made by his predecessor. *Wright v. LeCroy*, 184 Ark. 837, 44 S.W.2d 355 (1931).

Jurisdiction.

Where notice of appeal did not name the county as required, the court lacked jurisdiction to consider the appeal and attorney fees or costs were not granted. *Wise v. Parkman*, 932 F.2d 745 (8th Cir. 1991).

16-67-209. Interest allowed on allowances wrongfully obtained.

In cases of allowances made against counties, the circuit court shall render judgment in favor of the counties against the appellees for the

amount, with interest, of all such allowances wrongfully obtained by them.

History. Acts 1883, No. 27, § 6, p. 48; C. & M. Dig., § 2292; Pope's Dig., § 2918; A.S.A. 1947, § 27-2006.

CASE NOTES

Cited: Watts & Sanders v. Myatt, 216 Ark. 660, 226 S.W.2d 800 (1950); Bowden v. Oates, 248 Ark. 577, 452 S.W.2d 831 (1970); Union County v. Union County Election Comm'n, 274 Ark. 286, 623 S.W.2d 827 (1981).

SUBCHAPTER 3 — APPEAL TO SUPREME COURT

SECTION.

- 16-67-301. [Repealed.]
- 16-67-302. Rules for conduct of appeals.
- 16-67-303. [Superseded.]
- 16-67-304. [Superseded.]
- 16-67-305. Survival of right of review.
- 16-67-306. Style of parties.
- 16-67-307. [Superseded.]
- 16-67-308. Writs of error — Issuance.
- 16-67-309. Time for granting appeal or writ of error.
- 16-67-310 — 16-67-312. [Superseded.]
- 16-67-313. Bond for costs.
- 16-67-314. Record on appeal — Docketing appeal.
- 16-67-315. Transcript or bill of exceptions — Extension of time for filing — Authentication.
- 16-67-316. Order as to original papers or exhibits.
- 16-67-317. Time for trial.
- 16-67-318. Arrangement of appeals on docket.
- 16-67-319. Assignment of errors unnecessary.
- 16-67-320. Motion to dismiss.

SECTION.

- 16-67-321. Appeals taken for delay.
- 16-67-322. Death of party after appeal or writ of error — Effect.
- 16-67-323. Briefs by counsel.
- 16-67-324. Time court's decision becomes final.
- 16-67-325. Reversal, affirmation, or modification of judgment or order — Mandate of court — Enforcement.
- 16-67-326. Affirmance of judgment — Effect.
- 16-67-327. Reversal of judgment — Remand — Continuance.
- 16-67-328. Remand of case for insufficient facts in special verdict.
- 16-67-329. Rights of appellant on reversal.
- 16-67-330. Error which can be corrected on motion in lower court not ground for reversal.
- 16-67-331. Enforcement of mandate by fine and imprisonment.
- 16-67-332. Petitions for rehearing.

Effective Dates. Acts 1871, No. 48, § 1[890]: effective 90 days after passage.

Acts 1891, No. 159, § 4: effective on passage.

Acts 1899, No. 60, § 3: effective 60 days after passage.

Acts 1907, No. 137, § 2: effective on passage.

Acts 1913, No. 62, § 2: approved Feb. 18, 1913. Emergency declared.

Acts 1915, No. 62, § 2: effective on passage.

Acts 1929, No. 112, § 3: effective on

passage. Emergency declared. Approved Mar. 9, 1929.

Acts 1937, No. 355, § 2: approved Mar. 25, 1937. Emergency clause provided: "It is found that this act is necessary for the protection of litigants and for the speedy administration of justice, and for the preservation of the public peace, health and safety; an emergency is therefore declared and this act shall take effect and be in force from and after its passage."

Acts 1951, No. 213, § 3: approved Mar. 1, 1951. Emergency clause provided: "This

Act being for the proper regulation of appeals to the Supreme Court of Arkansas in cases of unavoidable casualty, and being a part of and germane to the Arkansas law of Civil Procedure in the perfection of appeals to the Supreme Court of Arkansas, and being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act shall be in full force and effect from and after its passage."

Acts 1963, No. 123, § 5: July 1, 1963.
Acts 1963, No. 547, § 4: Mar. 29, 1963.
Emergency clause provided: "It has been

found and is declared by the General Assembly of Arkansas that great inequalities and discriminations are imposed upon an appellant taking steps to secure judicial review of an order granting a new trial, and that there is an urgent need for an equalization of the rights of parties in judicial proceedings, and that an enactment of this bill will provide for more efficient judicial administration. Therefore, an emergency is declared to exist and this act being necessary for the service of public peace, health and safety, shall take effect and be in force from the date of its approval."

RESEARCH REFERENCES

Ark. L. Rev. The Work of the Supreme Court of Arkansas, 16 Ark. L. Rev. 241. A New Judicial System for Arkansas, 24 Ark. L. Rev. 221.

CASE NOTES

Cited: Peek Planting Co. v. W.H. Kennedy & Sons, 257 Ark. 669, 519 S.W.2d 49 (1975).

16-67-301. [Repealed.]

Publisher's Notes. This section was repealed by Acts 2003, No. 1185, § 203. The section was derived from Rev. Stat., ch. 117, § 41; A.S.A. 1947, § 27-2156.

16-67-302. Rules for conduct of appeals.

The Supreme Court may make rules for the convenient dispatch of business, the preservation of order, the argument of cases or motions, the manner and time of presenting motions or petitions for rehearing, the time of issuing its mandates and decisions, and modes of enforcing its mandates and orders, and it may change the rules.

History. Civil Code, § 883; Acts 1913, No. 62, § 1; C. & M. Dig., § 2171; Pope's Dig., § 2777; A.S.A. 1947, § 27-2142.

RESEARCH REFERENCES

Ark. L. Rev. Judicial Regulation of Procedure, 9 Ark. L. Rev. 146.

CASE NOTES

ANALYSIS

Authority of court.

Costs.

Mandates.

Authority of Court.

Where it is manifest that a cause has been fully developed, and that if the court had properly instructed the jury the plaintiff would have recovered a verdict, the Supreme Court, on reversing the case, has authority to enter judgment for the plaintiff. *Jackson v. Carter*, 169 Ark. 1154, 278 S.W. 32 (1925).

Costs.

Where appellant failed to set out the instructions of the circuit court in his abstract and brief required by rules of the Supreme Court, no costs for the abstract and brief will be taxed in case of reversal. *Baker v. Allen*, 66 Ark. 271, 50 S.W. 511 (1899); *Brinkley Car Works & Mfg. Co. v. Cooper*, 70 Ark. 331, 67 S.W. 752 (1901).

Mandates.

It was not error to refuse a continuance to the defendant where the plaintiff gave notice of the filing of the mandate to the defendant's attorney one week before the commencement of the term, if no prejudice was shown to have resulted to the defendant. *Saint Louis, I.M. & S. Ry. v. Sweet*, 60 Ark. 550, 31 S.W. 571 (1895).

Where, after the reversal of a conviction by the Supreme Court, it was made to appear that an agreement had been made for an immediate mandate to issue, if the accused felt that he would be aggrieved by the early issuance of a mandate, he should have applied to the Supreme Court for a recall since he could not raise the question in the circuit court. *Morton v. State*, 208 Ark. 492, 187 S.W.2d 335 (1945).

On appeal from an order awarding a writ of mandamus, the Supreme Court will issue an immediate mandate when it appears that good cause has been shown for the action. *Cobb v. Burrese*, 213 Ark. 177, 209 S.W.2d 694 (1948).

16-67-303. [Superseded.]

A.C.R.C. Notes. The Supreme Court of Arkansas stated in a *Per Curiam* of Nov. 24, 1986, that this section, concerning appealable judgments, was deemed superseded by the Arkansas Rules of Appellate Procedure and the Arkansas Rules for

Inferior Courts [now District Courts]. The section was derived from Civil Code § 15; Acts 1871, No. 48, § 1 [15], p. 219; C. & M. Dig., § 2129; Pope's Dig., § 2735; Acts 1963, No. 547, § 1; A.S.A. 1947, § 27-2101.

16-67-304. [Superseded.]

A.C.R.C. Notes. The Supreme Court of Arkansas stated in a *Per Curiam* of Nov. 24, 1986, that this section, concerning appeals from interlocutory orders in certain proceedings, was deemed superseded by the Arkansas Rules of Appellate Proce-

dures, the Arkansas Rules for Inferior Courts [now District Courts], and the Arkansas Rules of Civil Procedure. The section was derived from Acts 1937, No. 355, § 1; Pope's Dig., §§ 7507, 11194; A.S.A. 1947, § 27-2102.

16-67-305. Survival of right of review.

If a judgment is rendered against several persons, and one (1) of them dies, a writ of error or appeal may be brought upon the judgment by the survivors.

History. Rev. Stat., ch. 117, § 5; C. & M. Dig., § 2143; Pope's Dig., § 2749; A.S.A. 1947, § 27-2109.

16-67-306. Style of parties.

The party taking the appeal or writ of error shall be called the appellant and the adverse party, the appellee.

History. Civil Code, § 860; C. & M. Dig., § 2133; Pope's Dig., § 2739; A.S.A. 1947, § 27-2108.

16-67-307. [Superseded.]

A.C.R.C. Notes. The Supreme Court of Arkansas stated in a Per Curiam of Nov. 24, 1986, that this section, concerning the method of obtaining review, was deemed superseded by the Arkansas Rules of Ap-

pellate Procedure and the Arkansas Rules for Inferior Courts [now District Courts]. The section was derived from Civil Code, § 859; C. & M. Dig., § 2130; Pope's Dig., § 2736; A.S.A. 1947, § 27-2103.

16-67-308. Writs of error — Issuance.

Writs of error upon any final judgment or decision of any circuit court shall issue as of course, in all cases, out of the Supreme Court in vacation, as well as in term time, subject to the regulation prescribed by law.

History. Rev. Stat., ch. 117, § 1; C. & M. Dig., § 2132; Pope's Dig., § 2738; A.S.A. 1947, § 27-2105.

CASE NOTES**ANALYSIS**

Abolition by legislature.
Equity.

Abolition by Legislature.

The legislature cannot abolish the writ

of error. *Harrison v. Tradee*, 27 Ark. 59 (1871).

Equity.

Writ of error not applicable to proceeding in equity. *Barstow v. Pine Bluff, M. & N.O.R.R.*, 54 Ark. 551, 16 S.W. 574 (1891).

16-67-309. Time for granting appeal or writ of error.

An appeal or writ of error in a civil case shall not be granted except within six (6) months after the rendition of the judgment, order, or decree sought to be reviewed unless the party applying therefor was an infant or of unsound mind at the time of its rendition. In those cases an appeal or writ of error may be granted to such parties or their legal representatives within six (6) months after the removal of their disabilities or death.

History. Civil Code, § 867; Acts 1899, No. 60, § 1, p. 111; 1915, No. 62, § 1; C. & M. Dig., § 2140; Pope's Dig., § 2746; Acts 1951, No. 213, § 1; A.S.A. 1947, § 27-2106.

Publisher's Notes. This section may

be affected by §§ 16-67-310 and 16-67-312.

Cross References. Appeals from probate of will to be filed within three months after notice of probate, § 28-40-113.

RESEARCH REFERENCES

Ark. L. Rev. Extension by Supreme Court of Time for Perfecting Appeals, 5 Ark. L. Rev. 383.

CASE NOTES

ANALYSIS

Death.
Disability.
Failure to appeal.
Timeliness.
—Computation of time.
—Running of time.

Death.

No exception is made in the case of a party dying during the year. *Evans v. St. Louis, I.M. & S. Ry.*, 76 Ark. 266, 88 S.W. 994 (1905) (decision prior to 1915 amendment).

Disability.

Provision allowing insane person right of appeal within six months after removal of disabilities applies to suit brought by insane person as well as to one brought against him. *Hudson v. Union & Mercantile Trust Co.*, 148 Ark. 249, 230 S.W. 281 (1921).

Failure to Appeal.

All matters and issues settled in partition decree are foreclosed where appeal was not taken within the time prescribed by this statute. *Edgmon v. Edgmon*, 193 Ark. 1076, 104 S.W.2d 452 (1937).

Timeliness.

Appeal from judgment found not to be timely. *Spratlin v. Haller*, 69 Ark. 281, 62 S.W. 904 (1901); *Steele v. Scott*, 104 Ark. 379, 149 S.W. 341 (1912); *Smith v. First Nat'l Bank*, 119 Ark. 235, 177 S.W. 895 (1915); *Bank of El Paso v. Neal*, 181 Ark. 788, 27 S.W.2d 1024 (1930); *Dixon v. Dixon*, 220 Ark. 717, 249 S.W.2d 840 (1952).

Where there is nothing left to the master but to state an account on the basis fixed by the decree, the appeal must be taken within the time fixed. *Young v. Rose*, 80 Ark. 513, 98 S.W. 370 (1906).

Appeal not taken within six months from rendition of judgment appealed from will be dismissed. *Field v. Waters*, 148 Ark. 325, 229 S.W. 735 (1921).

Where a decree relative to a cross complaint clearly disposed of the pleading, an appeal from the decree must be taken within six months. *Flanagan v. Drainage Dist. No. 17*, 176 Ark. 31, 2 S.W.2d 70 (1928).

Appeal taken within six months is taken within time required by section. *Wharf Imp. Dist. No. 1 v. United States Gypsum Co.*, 181 Ark. 288, 25 S.W.2d 425 (1930); *Poe v. Walker*, 183 Ark. 659, 37 S.W.2d 866 (1931).

Filing a motion to vacate an order of dismissal with prejudice did not enlarge the time allowed for perfecting an appeal from the order. *Sheffield v. Brandenburg*, 190 Ark. 60, 76 S.W.2d 984 (1934).

Six month limit for filing of appeal is mandatory. *Dixon v. Dixon*, 220 Ark. 717, 249 S.W.2d 840 (1952).

—Computation of Time.

In computing the six months' period allowed for appeal, the day on which the appeal is filed is included. *Robertson v. Cunningham*, 207 Ark. 76, 178 S.W.2d 1014 (1944).

—Running of Time.

The time for appeal runs from the rendition of the judgment, and not from the overruling of the motion of a new trial. *Moore v. Henderson*, 74 Ark. 181, 85 S.W. 237 (1905).

The time for appeal does not run from the entry of the judgment. *Chatfield v. Jarratt*, 108 Ark. 523, 158 S.W. 146 (1913); *Oxford Tel. Mfg. Co. v. Arkansas Nat'l Bank*, 134 Ark. 386, 204 S.W. 1140 (1918).

Time runs from rendition of vacation decree of chancellor. *Davis v. Sparks*, 135 Ark. 412, 205 S.W. 803 (1918).

The time for appeal runs from the date of the rendition of the decree or judgment. *Caudle v. Turner*, 179 Ark. 337, 15 S.W.2d 978 (1929); *Robertson v. Cunningham*, 207 Ark. 76, 178 S.W.2d 1014 (1944).

Period for appeal was date from signing of decree instead of date of finding. *Bolls v. Craig*, 220 Ark. 880, 251 S.W.2d 482 (1952).

Cited: Rankin v. Schofield, 70 Ark. 83, 66 S.W. 197 (1902); Stephens v. Williams, 122 Ark. 255, 183 S.W. 527 (1916); Wood v. Yates-American Mach. Co., 246 Ark. 662, 439 S.W.2d 307 (1969); Brown v. Maryland Cas. Co., 246 Ark. 1074, 442 S.W.2d 187 (1969).

16-67-310 — 16-67-312. [Superseded.]

A.C.R.C. Notes. The Supreme Court of Arkansas stated in a Per Curiam of Nov. 24, 1986, that these sections, concerning appeals were deemed superseded by the Arkansas Rules of Appellate Procedure and the Arkansas Rules for Inferior Courts [now District Courts]. The sections were derived from the following sources:

16-67-310. Acts 1953, No. 555, §§ 2, 3; 1957, No. 194, §§ 1, 2; A.S.A. 1947, §§ 27-2106.1, 27-2106.2.

16-67-311. Acts 1963, No. 123, §§ 1-4; A.S.A. 1947, §§ 27-2106.3 — 27-2106.6.

16-67-312. Acts 1953, No. 555, § 2; 1957, No. 194, § 1; A.S.A. 1947, § 27-2106.1.

16-67-313. Bond for costs.

(a) The appellant may be required to give security for costs under the same circumstances that plaintiffs in civil action may be so required.

(b) Whenever a bond for costs on appeal is required by law, the bond shall be filed with the notice of appeal.

(c) The bond shall be in the sum of two hundred fifty dollars (\$250), unless the court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required.

(d) The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal is dismissed or the judgment or decree is affirmed or the payment of such costs as the appellate court may award if the judgment or decree is modified.

(e) If a bond on appeal in the sum of two hundred fifty dollars (\$250) is given, no approval thereof is necessary.

(f) After a bond on appeal is filed, an appellee may raise objections to the form of the bond or to the sufficiency of the surety for determination by the clerk.

(g)(1) If a bond on appeal or a supersedeas bond is not filed within the time allowed by law or if the bond filed is found insufficient and if the action is not yet docketed with the appellate court, a bond may be filed at such time before the action is so docketed as may be fixed by the court.

(2) After the action is docketed, application for leave to file a bond may be made only in the appellate court.

History. Civil Code, § 866; C. & M. Dig., § 2139; Pope's Dig., § 2745; Acts 1953, No. 555, §§ 4, 6; A.S.A. 1947, §§ 27-2107 — 27-2107.2.

Cross References. Supersedeas bond, ARAP 8.

CASE NOTES

ANALYSIS

Applicability.
Nonresidents.

Applicability.

This section does not apply to appeals in criminal cases. *Philyaw v. State*, 224 Ark. 859, 277 S.W.2d 484, cert. denied, 349 U.S. 967, 75 S. Ct. 901, 99 L. Ed. 1288 (1955).

This section applies only to civil cases. *McConnell v. State*, 227 Ark. 988, 302 S.W.2d 805 (1957).

This section relates only to civil cases, and has no application to a misdemeanor case. *England v. State*, 234 Ark. 421, 352 S.W.2d 582 (1961).

Nonresidents.

Nonresident appellant was required to execute a bond for the costs of the appeal. *Chambers v. Ogle*, 114 Ark. 237, 169 S.W. 795 (1914).

Cited: *Andrews v. Lauener*, 229 Ark. 894, 318 S.W.2d 805 (1958); *State v. Adkisson*, 251 Ark. 119, 471 S.W.2d 332 (1971).

16-67-314. Record on appeal — Docketing appeal.

(a)(1) The record on appeal shall be filed with the appellate court and the appeal there docketed within ninety (90) days from the date of filing the notice of appeal except that the trial court may prescribe the time for filing and docketing, which in no event shall be less than ninety (90) days from the date of filing the first notice of appeal.

(2) In all cases where there has been designated for inclusion any evidence or proceeding at the trial or hearing which was stenographically reported, the trial court, after finding that a reporter's transcript of the evidence or proceeding has been ordered by the appellant, in its discretion and with or without motion or notice, may extend the time for filing the record on appeal and docketing the appeal, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or extended by a previous order. However, the trial court shall not extend the time to a date more than seven (7) months from the date of the entry of the judgment or decree.

(b)(1) The clerk of the trial court, under his hand and the seal of the court, shall transmit to the appellate court a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of following:

(A) The material pleadings without unnecessary duplication;

(B) The verdict of the jury, if any;

(C) The findings of fact and conclusions of law, if any;

(D) The master's report, if any;

(E) The opinion of the court, if any;

(F) The judgment or decree or part thereof appealed from;

(G) The notice of appeal with the date of filing;

(H) The designations or stipulations of the parties as to matter to be included in the record; and

(I) Any statements by the appellant of the points on which he or she intends to rely.

(2) The matter so certified and transmitted shall constitute the record on appeal.

(c) The appellee may file an authenticated copy of the record in the clerk's office of the Supreme Court with the same effect as if filed by the appellant.

(d) If the Supreme Court has acquired jurisdiction of a cause, but it is made to appear that the record is incomplete for want of documents, exhibits, or a bill of exceptions, and the trial court has lost such jurisdiction, the Supreme Court, or a judge thereof, shall have power to direct a writ to any clerk, reporter, or other person charged with the duty of preparing the matter in question and may require compliance with its discretionary orders.

History. Civil Code, § 863; C. & M. Dig., § 2136; Pope's Dig., § 2742; Acts 1953, No. 148, § 1; 1953, No. 555, §§ 14, 20; 1971, No. 206, § 1; A.S.A. 1947, §§ 27-2127.1, 27-2127.8, 27-2128, 27-2129.2.

A.C.R.C. Notes. The Supreme Court

of Arkansas stated in a Per Curiam of Nov. 24, 1986, that subsections (a) and (b) of this section were deemed superseded by the Arkansas Rules of Appellate Procedure and the Arkansas Rules for Inferior Courts [now District Courts].

CASE NOTES

ANALYSIS

Purpose.

Applicability.

Authenticated copy.

Extension of time.

Multiple appeals.

Requirements of record.

Supreme court jurisdiction.

Time for filing.

Timeliness of filing.

Purpose.

The legislative intent of this section was to eliminate unnecessary delays in the docketing of appeals to this court. *Gallman v. Carnes*, 254 Ark. 155, 492 S.W.2d 255 (1973).

Applicability.

Acts 1953, No. 555 does not apply to appeals in criminal cases. *Philyaw v. State*, 224 Ark. 859, 277 S.W.2d 484, cert. denied, 349 U.S. 967, 75 S. Ct. 901, 99 L. Ed. 1288 (1955).

This section applies only to civil cases. *McConnell v. State*, 227 Ark. 988, 302 S.W.2d 805 (1957).

Authenticated Copy.

If an appeal from an order granting a new trial is not prosecuted, the appellee may file a transcript of the record and ask for an affirmance which will operate as an adjudication of the rights of the parties. *Bush v. Barksdale*, 122 Ark. 262, 183 S.W. 171 (1916).

Where appeal has been taken by appellant more than six months and supersedeas bond was filed in the circuit court but no authenticated copy of the record had been filed in the Supreme Court and appellee filed with the clerk of the Supreme Court a certified transcript of the judgment with the order of the trial court granting the appeal and supersedeas and moved to affirm the judgment and to give judgment against the sureties on the supersedeas bond, motion should be granted. *O'Daniel v. Brunswick Balke Collender Co.*, 195 Ark. 669, 113 S.W.2d 717 (1938).

An appellee filing a transcript under this section is entitled to the costs thereof upon affirmance of the judgment appealed from. *Cowling v. Foreman*, 238 Ark. 677, 384 S.W.2d 251 (1964).

Extension of Time.

No amount of local custom can vary the provision of this section that requires the extension order to be granted by the court. *Southwest Cas. Co. v. Wesson*, 226 Ark. 16, 287 S.W.2d 575 (1956).

The order for extension of time to file the record on appeal must be obtained from the court and not the court reporter. *Southwest Cas. Co. v. Wesson*, 226 Ark. 16, 287 S.W.2d 575 (1956).

The fact that one of the attorneys for appellant was out of the state for a time and later was ill did not excuse failure to procure order for extension of time to file

record on appeal where appellant's other attorney could have procured the order. *Southwest Cas. Co. v. Wesson*, 226 Ark. 16, 287 S.W.2d 575 (1956).

Where there was no request for extension of time to file the record on appeal made or granted within 90 days from filing of the notice of appeal, circuit court was without authority to make an extension order. *Southwest Cas. Co. v. Wesson*, 226 Ark. 16, 287 S.W.2d 575 (1956).

Appeal not dismissed where filing extension granted by trial court. *J.R. Watkins Co. v. Martin*, 229 Ark. 750, 318 S.W.2d 591 (1958); *Housing Auth. v. Renshaw & Taylor*, 258 Ark. 1020, 534 S.W.2d 1 (1975); *C & M Constr. Co. v. Simmons First Nat'l Bank*, 260 Ark. 906, 545 S.W.2d 631 (1977).

Where appellant, without notice to appellees, obtained an order extending the time originally allowed for lodging the record in this court, it was the decision of the court not to apply the provisions of this section and conditioned granting an extension of time for docketing the appeal only on a showing that appellant needed the time to obtain a transcription of evidence; to apply the provision without allowing a short period of grace would have created unnecessary hardship for litigants. *Gallman v. Carnes*, 254 Ark. 155, 492 S.W.2d 255 (1973).

Where trial judge and attorneys made an error as to when the extension period began to run, the record was allowed to be filed after the expiration of the period, but after January 1, 1975, the statute should be applied according to its terms. *Holman v. State*, 257 Ark. 239, 515 S.W.2d 638 (1974).

Where an appellee does not object to the obtaining of an extension at the first opportunity he will be deemed to have waived the error. *Owens v. Bill & Tony's Liquor Store*, 258 Ark. 887, 529 S.W.2d 354 (1975).

Where trial court, more than 90 days after the filing of the notice of appeal, granted additional time to prepare and file the transcript and entered the order giving a date within the 90-day period, the appeal was dismissed because not in compliance with this section, since the order of extension was not actually made within the period allowed. *Canal Ins. Co. v. Arney*, 258 Ark. 893, 530 S.W.2d 178 (1975).

Where a motion for a new trial has been properly filed and acted upon pursuant to § 16-67-311, the seven month limitation in this section must be calculated from the date of an order denying the properly filed motion for a new trial and not from the date of the original decree. *Sherrell v. Byram*, 260 Ark. 908, 545 S.W.2d 603 (1977).

Where the chancellor entered an order extending the time for perfection of appeal, even though the order was entered on the ninetieth day after filing of the notice of appeal, the chancellor did not abuse his discretion since the record indicated his decision was made after an extensive hearing and careful consideration. *Harper v. Pearson*, 262 Ark. 294, 556 S.W.2d 142 (1977).

Although A.R.A.P. 5(b) states no specific time requirement as to notice that counsel seeking an extension of time to file the record on appeal must give to opposing counsel, the history of the notice requirements on petitions for extension as set forth in *Gallman v. Carnes*, 254 Ark. 155, 492 S.W.2d 255 (1973) and the court's pronouncements in that case make it clear that the only requirement is for "reasonable notice" within the discretion of the trial court. *Osborn v. Wilson*, 11 Ark. App. 226, 669 S.W.2d 481 (1984).

Multiple Appeals.

A party who has taken an appeal without supersedeas and failed to perfect the appeal by filing the transcript within time may take another appeal at any time within the period during which appeals are allowed, and it is not necessary to docket and dismiss the first appeal. *Turner v. Tapscott*, 29 Ark. 318 (1874) (decision under prior law).

When a supersedeas bond has been filed, no writ of error lies, nor can a second appeal be granted until the first appeal is dismissed. *Rice v. Reed*, 29 Ark. 320 (1874) (decision under prior law).

Where an appeal is without supersedeas, time for perfecting the first appeal will not be extended if a second appeal has been obtained unless the second appeal will impair a right that might be reserved by perfecting the first. *Barstow v. Pine Bluff, M. & N.O.R.R.*, 54 Ark. 551, 16 S.W. 574 (1891) (decision under prior law).

Where an appeal is taken with supersedeas, the better practice is to dismiss the

first before taking a second appeal; however, the effect of procuring the second appeal is a voluntary dismissal of the first. *North State Fire Ins. Co. v. Dillard*, 86 Ark. 561, 111 S.W. 1003 (1908) (decision under prior law).

Requirements of Record.

The record must be signed by the clerk and bear the seal of the court. *Damon v. Hammonds*, 73 Ark. 608, 84 S.W. 796 (1905).

Failure of clerk to verify record was not fatal where clerk thereafter certified to correctness of the record. *Collie v. Coleman*, 223 Ark. 206, 265 S.W.2d 515 (1954).

It is the duty of the appellee to designate for inclusion in the record any explanatory matter that might be needed to support the court's action and of the appellant to include in the record any additional record designated by appellee. *Beevers v. Miller*, 242 Ark. 541, 414 S.W.2d 603 (1967).

Supreme Court Jurisdiction.

Defendant filed in the Supreme Court a motion that he be allowed to proceed in forma pauperis. The motion was duly verified and his counsel certified that they were serving without compensation. The defendant complied with the requirements of the law so as to be allowed to proceed in forma pauperis. *Edwards v. State*, 232 Ark. 748, 339 S.W.2d 947 (1960).

Subsection (d) had no application to an ex parte appeal from the action of the circuit court in denying appellant's ex parte motion for an order requiring the court reporter to prepare a transcript of certain proceedings in that court, since the appeal was without the court reporter who was a necessary party. *Wirges v. Bean*, 238 Ark. 104, 378 S.W.2d 641 (1964).

Subsection (d) is limited to cases involving appeals and has no application to mandamus or certiorari cases. *Wirges v. Bean*, 238 Ark. 104, 378 S.W.2d 641 (1964).

Time for Filing.

Filing of a petition within 30 days from a decree was valid notice of appeal where the appellant believes a certiorari action is necessary, but the appellate court clerk must refuse to accept the record offered by the appellant without an order of the

appellate court over 90 days after the petition was filed. *Fulks v. Walker*, 224 Ark. 639, 275 S.W.2d 873 (1955).

Appellant must file his record with the clerk of the Supreme Court (a) within 90 days after notice of appeal is given or (b) within the time as extended by the trial court and any extension of time made by the trial court must be made before the 90 day period expires or before the expiration of any previous extension. *West v. Smith*, 224 Ark. 651, 278 S.W.2d 126 (1955).

Under its inherent constitutional power the Supreme Court may in a most exceptional case allow a record to be filed after the time fixed by this section. *West v. Smith*, 224 Ark. 651, 278 S.W.2d 126 (1955).

Where § 16-67-312 was not readily reconcilable with the provisions of this section as to the time of filing the record and the language of the two sections was subject to different views and conclusions, the court extended the time of application of its decision as to the time of filing the record. *West v. Smith*, 224 Ark. 651, 278 S.W.2d 126 (1955).

Where contract relied on was designated as part of the record but was not filed with clerk of Supreme Court or actually made a part of the record, Supreme Court could not consider instrument in determining if trial court erred. *American Accident & Life Ins. Co. v. American Pioneer Life Ins. Co.*, 247 Ark. 355, 445 S.W.2d 896 (1969).

Timeliness of Filing.

Late filing of record not excusable. *Barstow v. Pine Bluff, M. & N.O.R.R.*, 54 Ark. 551, 16 S.W. 574 (1891) (decision under prior law); *Wherry v. Wherry*, 239 Ark. 450, 389 S.W.2d 877 (1965); *Bernard v. Howell*, 254 Ark. 828, 496 S.W.2d 362 (1973); *Mahan v. Estate of Mahan*, 282 Ark. 393, 668 S.W.2d 943 (1984).

Where defendants appealed from a decree cancelling as fraudulent a deed executed by plaintiff, but foreclosing a mortgage executed by one of the defendants to an innocent mortgagee and the plaintiff prayed a cross appeal in the lower court from the decree of foreclosure, but the transcript was not filed in the Supreme Court within 90 days, the subsequent granting of an appeal to the defendants did not operate to perfect the plaintiff's cross appeal against the mortgagee-defen-

dant who did not appeal. *Baldwin v. Brown*, 166 Ark. 1, 265 S.W. 976 (1924) (decision under prior law).

Cited: *Andrews v. Lauener*, 229 Ark. 894, 318 S.W.2d 805 (1958); *State v. Adkisson*, 251 Ark. 119, 471 S.W.2d 332

(1971); *Perry v. Perry*, 257 Ark. 237, 515 S.W.2d 640 (1974); *Campbell v. State*, 265 Ark. 77, 576 S.W.2d 938 (1979); *Davis v. C & M Tractor Co.*, 2 Ark. App. 150, 617 S.W.2d 382 (1981).

16-67-315. Transcript or bill of exceptions — Extension of time for filing — Authentication.

(a) In all cases where a prayer for appeal is granted by the trial court and supersedeas bond filed in the manner provided by law, the Arkansas Supreme Court may, and is given authority, on showing of unavoidable casualty such as the death of the official reporter, the length of the trial record, or for other meritorious cause shown, to extend the time for filing a transcript or a bill of exceptions, as the case may be, by its order or by writ of certiorari, for an additional period of time not to exceed one hundred twenty (120) days from and after the expiration of the appeal period now provided by law.

(b) In the preparation of the transcript or bill of exceptions on appeal the trial judge is vested with authority during the one hundred twenty-day extension period to pass upon and authenticate the transcript or bill of exceptions by his or her certificate in the same manner as now provided by law.

History. Civil Code, § 867; C. & M. 1951, No. 213, § 1; A.S.A. 1947, § 27-Dig., § 2140; Pope's Dig., § 2746; Acts 2106.

RESEARCH REFERENCES

Ark. L. Rev. Extension by Supreme Court of Time for Perfecting Appeals, 5 Ark. L. Rev. 383.

CASE NOTES

ANALYSIS

Additional time.
Amendment of transcript.
Authenticated copy.

Additional Time.

Amendment of 1951 does not apply to appeal prayed out of Supreme Court, since amendment allowing additional time for filing of transcript applies only to appeals prayed out of lower courts. *Bolls v. Craig*, 220 Ark. 880, 251 S.W.2d 482 (1952).

Amendment of Transcript.

Amendment of transcript not allowed where time for appeal had expired. *Hogan*

v. Bright, 214 Ark. 691, 218 S.W.2d 80 (1949).

Authenticated Copy.

The clerk of the Supreme Court cannot grant an appeal in the absence of an authenticated copy of the record. *Damon v. Hammonds*, 73 Ark. 608, 84 S.W. 796 (1905).

Cited: *Rankin v. Schofield*, 70 Ark. 83, 66 S.W. 197 (1902); *Stephens v. Williams*, 122 Ark. 255, 183 S.W. 527 (1916); *Wood v. Yates-American Mach. Co.*, 246 Ark. 662, 439 S.W.2d 307 (1969); *Brown v. Maryland Cas. Co.*, 246 Ark. 1074, 442 S.W.2d 187 (1969).

16-67-316. Order as to original papers or exhibits.

Whenever the trial court is of the opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies it may make such order therefor and for the safekeeping, transportation, and return thereof, as it deems proper.

History. Acts 1953, No. 555, § 16;
A.S.A. 1947, § 27-2130.1.

CASE NOTES**Applicability.**

This section does not apply to appeals in criminal cases. *Philyaw v. State*, 224 Ark. 859, 277 S.W.2d 484, cert. denied, 349 U.S. 967, 75 S. Ct. 901, 99 L. Ed. 1288 (1955).

This section applies only to civil cases. *McConnell v. State*, 227 Ark. 988, 302 S.W.2d 805 (1957).

16-67-317. Time for trial.

Appeals and writs of error shall stand for trial when the copy of the record shall have been filed in the office of the clerk of the court for sixty (60) days unless a summons is required, in which case the cause shall stand for trial sixty (60) days after the service of the summons.

History. Civil Code, § 876; Acts 1907, No. 137, § 1, p. 329; C. & M. Dig., § 2164; Pope's Dig., § 2770; A.S.A. 1947, § 27-2135.

16-67-318. Arrangement of appeals on docket.

The clerk shall arrange the appeals upon the docket, setting a proper number for each day of the term, and, in arranging them, may have due regard to the convenience of litigants in placing together the appeals from the several judicial districts.

History. Civil Code, § 877; C. & M. Dig., § 2165; Pope's Dig., § 2771; A.S.A. 1947, § 27-2136.

16-67-319. Assignment of errors unnecessary.

No written assignment of error shall be necessary, but the judgment may be reversed or modified for any error appearing in the record to the prejudice of an appellant or cross-appellant.

History. Civil Code, § 879; C. & M. Dig., § 2167; Pope's Dig., § 2773; A.S.A. 1947, § 27-2138.

16-67-320. Motion to dismiss.

(a) Where the appeal or writ of error was improperly granted or the appellant's right of further prosecuting the appeal or writ of error has

ceased, the appellee, in lieu of pleading, may move the court to dismiss the appeal or writ of error.

(b) The grounds of the motion to dismiss shall be stated in writing, signed by the appellee or his or her counsel, and, if not appearing on the face of the record or by a writing purporting to have been signed by the appellant and filed, shall be verified by affidavit.

(c) The motion shall not be heard or determined before the day on which the appeal or writ of error is set for trial on the docket, unless the appellant consents thereto.

(d) The appellee may by answer filed and verified by himself or herself, or agent or attorney, plead any fact or facts which renders the granting of the appeal or writ of error improper or destroys the appellant's right of further prosecuting the appeal or writ of error; to which answer, the appellant shall file a reply, likewise verified by the affidavit of himself or herself, agent, or attorney. The questions of law or fact thereon shall be determined by the court.

History. Civil Code, §§ 880, 881; C. & §§ 2774, 2775; A.S.A. 1947, §§ 27-2139, M. Dig., §§ 2168, 2169; Pope's Dig., 27-2140.

CASE NOTES

ANALYSIS

Acceptance of benefit.

Costs.

Discharge of receiver.

Foreign jurisdiction.

Overruling of motion.

Payment of judgment.

Supplemental complaint.

Acceptance of Benefit.

The right to appeal is waived by the acceptance of a benefit under the judgment inconsistent with the appeal; and evidence outside the record will be received by the Supreme Court to establish the waiver. *Bolen v. Cumbey*, 53 Ark. 514, 14 S.W. 926 (1890); *Hopson v. Frierson*, 106 Ark. 292, 152 S.W. 1008 (1912); *Wolford v. Warfield*, 170 Ark. 82, 278 S.W. 639 (1926).

An appeal from a decree of divorce is subject to dismissal on the appellant's remarriage for the reason that the marriage constitutes an acceptance of the benefit of the decree. *Butts v. Butts*, 152 Ark. 399, 238 S.W. 600 (1922).

Costs.

The costs of an appeal unnecessarily taken after the subject matter of the litigation has been settled by another tribunal should be taxed against the appel-

lants. *Young v. Boles*, 92 Ark. 242, 122 S.W. 496 (1909).

Discharge of Receiver.

Where, pending an appeal from a judgment in favor of a receiver upon a claim against him, the receiver is discharged without reservation as to existing claims, the receiver may move to dismiss the appeal. *O'Leary v. Brent*, 97 Ark. 372, 134 S.W. 617 (1911).

Foreign Jurisdiction.

An appellee may plead that since the appeal was taken, a court of competent jurisdiction has rendered a judgment which settled against the appellant the rights asserted on appeal. *Pillow v. King*, 55 Ark. 633, 18 S.W. 764 (1892); *Church v. Gallic*, 76 Ark. 423, 88 S.W. 979 (1905).

Plaintiff not found to have waived or abandoned her right to appeal where proceeding had in foreign jurisdiction. *Ladd v. Ladd*, 265 Ark. 725, 580 S.W.2d 696 (1979).

Overruling of Motion.

Overruling of petition for rehearing operated as an overruling of motion to dismiss purchaser's appeal. *Hopson v. Frierson*, 106 Ark. 292, 152 S.W. 1008 (1912).

Payment of Judgment.

If, as a matter of right, the payer of an

outstanding judgment could have posted a supersedeas bond instead of paying the judgment, he must show that he was unable to post bond, or his payment of the judgment is deemed voluntary and his appeal from the judgment is rendered moot. *Lytle v. Citizens Bank*, 4 Ark. App. 294, 630 S.W.2d 546 (1982).

Supplemental Complaint.

The filing of a supplemental complaint is an abandonment of an appeal. *Arkansas Mut. Life Ins. Co. v. Stuckney*, 85 Ark. 33, 106 S.W. 203 (1907).

Cited: *Young v. Boles*, 92 Ark. 242, 122 S.W. 496 (1909).

16-67-321. Appeals taken for delay.

(a)(1) Where an appeal or a writ of error, with a supersedeas, has been taken merely for delay, the appellee may at any time move the court to affirm the judgment or order as a delay case.

(2) Before making the motion to affirm the judgment or order as a delay case, the appellee or his or her counsel shall endorse on the record in substance that he or she has carefully examined the record and believes the appeal or writ of error is prosecuted for delay merely.

(b) Upon the filing of the motion to affirm the judgment or order as a delay case, the court shall examine the record and, if it finds no error in the proceedings and believes the appeal or writ of error was prosecuted merely for delay, shall affirm the judgment or order.

(c) The appellee may, in open court, confess error at any time, whereupon the case shall be reversed and remanded to the court from which the appeal or writ of error was taken.

History. Civil Code, § 882; C. & M. Dig., § 2170; Pope's Dig., § 2776; A.S.A. 1947, § 27-2141.

Cross References. Procedure in delay cases, S. Ct. Rule 4.

CASE NOTES

ANALYSIS

Absence of error.
Compliance.
Delay of appeal.
Timeliness.

Absence of Error.

To justify a motion to advance a cause upon the docket, on the ground that the appeal is prosecuted for delay merely, the absence of error should be apparent upon a short and cursory examination of the record. *Vaught v. Green*, 51 Ark. 378, 11 S.W. 587 (1888).

Where it is necessary to examine the pleadings and abstract and weigh the testimony pro and con to see whether there was probable cause to justify the appeal, motion for affirmance as a delay case should not be granted. *Strahan v. Atlanta Nat'l Bank*, 206 Ark. 522, 176 S.W.2d 236 (1943).

A motion to advance and affirm can be

granted on the ground that the appeal is prosecuted solely for the purpose of delay and when the absence of error is apparent from a short and cursory examination of the record. *City of Lonoke v. Richey*, 277 Ark. 335, 641 S.W.2d 701 (1982).

Compliance.

Where appellee had not complied with the requirement that there be endorsed on the record the assertion that the appeal was taken for delay and since the section is evidently penal, court could not be called upon to explore the question of whether the appellant should be penalized for delay. *Hollaway v. Pocahontas Fed. Sav. & Loan Ass'n*, 230 Ark. 310, 323 S.W.2d 204 (1959).

Both this section and Rules of Sup. Ct. & Ct. of App., Rule 4 require that counsel for the appellee endorse on the record a statement that he believes the appeal is prosecuted for delay. The requirement,

being penal, must be strictly observed; so it is not the Supreme Court's practice to penalize an appellant for delay when the requirement has not been met. *Dorazio v. Davis*, 283 Ark. 65, 671 S.W.2d 173 (1984).

Delay of Appeal.

Where a cursory examination of the record showed that defendant's appeal was obviously untimely filed, and that the defendant took the appeal merely to delay complying with court order, appellate court ordered the case advanced and af-

firmed on its merits. *City of Lonoke v. Richey*, 277 Ark. 335, 641 S.W.2d 701 (1982).

Timeliness.

This section does not require the motion to be filed at any time or term, but contemplates an affirmance of a superseded judgment when the court is satisfied that the appeal is taken for delay, at the earliest practicable moment. *Chafin v. McFadden*, 44 Ark. 523 (1884).

16-67-322. Death of party after appeal or writ of error — Effect.

(a) If all the appellants or plaintiffs in error die after the appeal taken or writ of error brought and before judgment is rendered thereon, the executor or administrator of the last surviving appellant or plaintiff, or the heirs or devisees of the appellant or plaintiff in cases where they would be entitled to bring writs of error or prosecute an appeal, may be substituted for the appellant or plaintiff and the cause shall proceed at their suit.

(b) If all the appellees, the sole appellee, all the defendants, or the sole defendant in a writ of error die after an appeal is entered or writ of error brought and before judgment thereon, the executors or administrators of the appellees or defendants may be compelled to become parties and join in error in the same manner as in an original suit.

History. Rev. Stat., ch. 117, §§ 29, 30; §§ 2759, 2760; A.S.A. 1947, §§ 27-2131, C. & M. Dig., §§ 2153, 2154; Pope's Dig., 27-2132.

CASE NOTES

Date of Judgment.

If either party dies after the cause is submitted and before final judgment, the judgment may be rendered in the names of the original parties, as of a day previous to the death; or if the death of either party is suggested and proved, a nunc pro tunc

order may be made, to extend back to a day after submission and before the death. *Pool v. Loomis*, 5 Ark. 110 (1843); *Trapnall v. Burton*, 24 Ark. 371 (1866).

Cited: *Constitution State Ins. Co. v. Passmore*, 18 Ark. App. 247, 713 S.W.2d 255 (1986).

16-67-323. Briefs by counsel.

The counsel who shall make briefs under the rules and regulations of the Supreme Court shall, after the statement of the cause, briefly state the points and the authorities relied on and shall cause the briefs to be filed with the opinion of the court, and the brief shall form a part of the record in the cause.

History. Rev. Stat., ch. 127, § 2; C. & M. Dig., § 2182; Pope's Dig., § 2791; A.S.A. 1947, § 27-2143.

16-67-324. Time court's decision becomes final.

No mandate shall issue and no decision shall become final until after fifteen (15) judicial days from the time the decision was rendered, unless the court, for good cause shown, shall otherwise direct.

History. Civil Code, § 883; Acts 1913, No. 62, § 1; C. & M. Dig., § 2171; Pope's Dig., § 2777; A.S.A. 1947, § 27-2142.

16-67-325. Reversal, affirmation, or modification of judgment or order — Mandate of court — Enforcement.

(a) The Supreme Court may reverse, affirm, or modify the judgment or order appealed from, in whole or in part and as to any or all parties, and when the judgment or order has been reversed or affirmed, the Supreme Court may remand or dismiss the cause and enter such judgment upon the record as it may in its discretion deem just.

(b)(1) When a cause is affirmed or reversed and remanded, the mandate must be taken out and filed in the court from which the appeal was taken by the plaintiff or defendant within one (1) year from the rendition of the judgment, affirming or reversing the cause, and not thereafter.

(2) Immediately upon the expiration of the period of one (1) year after the judgment of reversal is entered, when the mandate is not taken out, the clerk of the Supreme Court shall upon application of the party entitled thereto issue an execution for all costs accrued up to the date of reversal in the Supreme Court and in the court from which the cause has been appealed.

(c)(1) Upon the determination of any appeal or writ of error, the Supreme Court may award execution to carry the determination of the appeal or writ of error into effect or may remand the record with the decision of the court thereon to the circuit court in which the cause originated and order such decision to be carried into effect if the mandate is taken out and filed with the court from which the appeal came within twelve (12) months from the determination of any appeal.

(2) The decision shall be carried into effect within ten (10) years from the rendition of the judgment and not thereafter.

(d) Upon the affirmance by the Supreme Court of any judgment, order, or decree which has been wholly or in part superseded, judgment shall be rendered and entered up against the securities on the supersedeas bond and the court shall award execution thereon.

History. Civil Code, § 16; Acts 1871, No. 48, § 1[16], p. 219; 1891, No. 159, § 2, p. 280; C. & M. Dig., §§ 2176-2178, 2183; Acts 1929, No. 112, §§ 1, 2; Pope's Dig., §§ 2785-2787, 2792; A.S.A. 1947, §§ 27-

2144 — 27-2147; Acts 2003, No. 1185, § 204.

Amendments. The 2003 amendment repealed former (e).

CASE NOTES

ANALYSIS

Applicability.
 Affirmance.
 Amendment.
 Damages.
 Dismissal.
 Mandate.
 Remand.
 Remittitur.
 Reversal.
 Sentencing.
 Sureties and bonds.

Applicability.

This section applies to criminal as well as civil cases. *Hadley v. State*, 196 Ark. 307, 117 S.W.2d 352 (1938).

Affirmance.

When the judgment is right upon the whole record, it will be affirmed. *Keith v. Freeman*, 43 Ark. 296 (1884); *Burton & Townsend v. Baird & Bright*, 44 Ark. 556 (1884); *Hershy v. Latham*, 46 Ark. 542 (1885); *Pipkin v. Williams*, 57 Ark. 242, 21 S.W. 433 (1893).

Where a judgment of a lower court was affirmed by the Supreme Court and judgment was rendered against the appellant and the sureties on its supersedeas bond for that sum with interest due from the date of the judgment below, the interest which had accumulated at the time of the judgment in the Supreme Court was a part of the judgment and bears interest the same as the principal. *Arkansas S.R.R. v. German Nat'l Bank*, 85 Ark. 136, 107 S.W. 668 (1908).

Amendment.

An affirmance may remand with leave to appellant to amend. *Robinson v. Davis*, 66 Ark. 429, 51 S.W. 66 (1899).

Judgment below amended to conform to complaint. *Hess v. Adler*, 67 Ark. 444, 55 S.W. 843 (1900).

Damages.

The Supreme Court will not reverse and remand when appellant's claim only entitles him to nominal damages. *Buckner v. Pacific & G.E. Ry.*, 53 Ark. 16, 13 S.W. 332 (1890); *De Yampert v. Johnson*, 54 Ark. 165, 15 S.W. 363 (1891); *Ringlehaupt v. Young*, 55 Ark. 128, 17 S.W. 710 (1891); *Glasscock v. Rosengrant*, 55 Ark. 376, 18 S.W. 379 (1892).

When the plaintiff is entitled to nominal damages, costs will be awarded in his favor in the Supreme Court. *De Yampert v. Johnson*, 54 Ark. 165, 15 S.W. 363 (1891).

A judgment for a plaintiff for punitive damages for malicious prosecution was required to be reversed because the jury's verdict did not award any compensatory damages. It was held that judgment would not be entered for the defendant or the cause dismissed notwithstanding the verdict but judgment would be reversed and the cause remanded. *Kroger Grocery & Baking Co. v. Reeves*, 210 Ark. 178, 194 S.W.2d 876 (1946).

Dismissal.

After several reversals for want of evidence to sustain the judgment, the Supreme Court will end the litigation by a dismissal. *Saint Louis, I.M. & S. Ry. v. Morgart*, 56 Ark. 213, 19 S.W. 751 (1892).

Mandate.

To invoke the lower court's aid in enforcing the judgment of the Supreme Court rendered on appeal, the prevailing litigant must file the mandate in the lower court within a year, but a failure to do so does not amend the judgment. *Robeson v. Kempner*, 189 Ark. 27, 70 S.W.2d 37 (1934).

Where the matter involving the right to lease county property came up for hearing in circuit court without the mandate from the Supreme Court having been filed within the 12 months limited by the section, the circuit court was without jurisdiction to enter the order from which the appeal was taken. *Piggott Junior Chamber of Commerce v. Hollis*, 258 Ark. 692, 528 S.W.2d 915 (1975).

Remand.

The Supreme Court has the power, but will not usually exercise it, to remand a chancery case to be opened for further testimony. *Carmack v. Lovett*, 44 Ark. 180 (1884).

The Supreme Court will not remand a chancery case when the record shows what the rights of the parties are, but will render such decree as ought to have been rendered below. *Pickett v. Ferguson*, 45 Ark. 177 (1885); *Crease v. Lawrence*, 48 Ark. 312, 3 S.W. 196 (1886).

When the judgment of the lower court is

reversed with the special finding, it will be remanded with directions to enter judgment on the special verdict. *Powell v. Holman*, 50 Ark. 85, 6 S.W. 505 (1887).

Chancery cases will be remanded when both parties without fault have omitted material testimony. *Turman v. Bell*, 54 Ark. 273, 15 S.W. 886 (1891).

It is within the power of the court to render final judgment here, but the better practice is to reverse and remand with directions. *Lenon v. Mutual Life Ins. Co.*, 80 Ark. 563, 98 S.W. 117, 8 L.R.A. (n.s.) 193 (1906).

Where evidence was not sufficient to justify verdict of guilty, case was remanded for a new trial. *Grigson v. State*, 221 Ark. 14, 251 S.W.2d 1021 (1952).

Remittitur.

A remittitur cannot be entered to cure an excessive judgment for damages, when the damages erroneously assessed are punitive as well as compensatory. *Saint Louis, I.M. & S. Ry. v. Hall*, 53 Ark. 7, 13 S.W. 138 (1890).

When error as to admissibility of evidence as to value of property can be cured by a remittitur, a judgment will be affirmed on the entry of the remittitur. *Fordyce v. Hardin*, 54 Ark. 554, 16 S.W. 576 (1891).

Reversal.

When an agreed statement of facts shows that the judgment should have been entered for appellant, the cause will be reversed, with directions to enter judgment accordingly. *Barton v. Lattourette*, 55 Ark. 81, 17 S.W. 588 (1891).

If plaintiff's evidence shows affirmatively that he is not entitled to recover, judgment in his favor will be reversed and complaint dismissed. *Pennington v. Underwood*, 56 Ark. 53, 19 S.W. 108 (1892); *Saint Louis, I.M. & S. Ry. v. Ross*, 56 Ark. 271, 19 S.W. 837 (1892).

Where a case is reversed on appeal and remanded for new trial, the case stands as if no action had been taken by the trial court and is no bar to a further suit on the same cause of action. *Palmer v. Carden*, 239 Ark. 336, 389 S.W.2d 428 (1965).

Where judgment for plaintiff in suit in circuit court was reversed and remanded for new trial which was never held, case stood as if no action had been taken and plaintiff was not barred from subsequent

suit in chancery on another cause. *Palmer v. Carden*, 239 Ark. 336, 389 S.W.2d 428 (1965).

Where the erroneous instruction which occasioned the reversal only adversely affected the rights of appellant, and it was unable to say that in action against other defendant alone the jury would have rendered a verdict for the same amount in damages, the circumstances required a reversal as to both defendants. *Steel Erectors, Inc. v. Lee*, 253 Ark. 151, 484 S.W.2d 874 (1972).

Sentencing.

The Supreme Court may modify a conviction for murder in the first degree by reversing as to the conviction and remand with directions to sentence the defendant for the lesser grade which it finds the evidence established. *Simpson v. State*, 56 Ark. 8, 19 S.W. 99 (1892).

The Supreme Court may reduce a conviction of murder in the first degree to murder in the second degree with a lesser sentence. *Blake v. State*, 186 Ark. 77, 52 S.W.2d 644 (1932).

Error by trial court in admitting evidence of previous felony conviction during sentencing stage of robbery trial, after guilt had been adjudicated, did not require new trial since, under this section, court has power to modify the judgment of a trial court and to reduce the penalty in criminal cases to that penalty which is appropriate for the crime involved. *Wilburn v. State*, 253 Ark. 608, 487 S.W.2d 600 (1972).

Where evidence was insufficient to support a capital murder conviction, but sufficient to support a homicide conviction, the Supreme Court could, upon appeal, reduce the sentence of life imprisonment without parole. *Bly v. State*, 263 Ark. 138, 562 S.W.2d 605 (1978).

Where the jury fixed sentence of defendant at substantially less than the maximum authorized by law and the trial court suspended the sentence on the one count, no prejudicial error in the sentencing was shown and the court on appeal had no authority to modify the sentence. *Nicholas v. State*, 268 Ark. App. 541, 595 S.W.2d 237 (Ct. App. 1980).

Where sentence was erroneously enhanced on basis of prior conviction, the error did not mandate a new trial since Supreme Court could reduce the sentence

in lieu of reversing and remanding for a new trial. *Ellis v. State*, 270 Ark. 243, 603 S.W.2d 891 (1980).

An error which relates only to punishment may be corrected by reducing the sentence in lieu of reversing and remanding for a new trial. *Richards v. State*, 309 Ark. 133, 827 S.W.2d 155 (1992).

Where defendant's kidnapping charge should have been classified as a Class B felony rather than a Class Y felony because defendant voluntarily released victim and she was found alive and in a safe place, court could correct the punishment by reducing the sentence in lieu of reversing and remanding. *Morris v. State*, 53 Ark. App. 183, 920 S.W.2d 508 (1996).

Conviction for criminal mischief in the first degree (§ 5-38-203) reduced to criminal mischief in the second degree (§ 5-38-204) after appellate review of the sufficiency of the evidence. *McGill v. State*, 60 Ark. App. 246, 962 S.W.2d 382 (1998).

Sureties and Bonds.

The sureties in a supersedeas bond become, in legal effect, parties to the suit, and agree, in case of affirmance, that judgment may be rendered against them by the Supreme Court for costs and damages and the amount of the judgment below, and a judgment so rendered is not void for want of jurisdiction. *White v. Prigmore*, 29 Ark. 208 (1874).

Upon the affirmance of a decree for money, the decree goes against the sureties in the appeal bond as of course, and they are not entitled to notice before decrees against them. *Rogers v. Brooks*, 31 Ark. 194 (1876).

The supersedeas bond does not change the nature of the judgment or decree on affirmance in the Supreme Court, and when no judgment for the recovery of money was rendered or could have been rendered in the lower court, none can be rendered upon the bond on appeal. *Ste-*

phens v. Shannon, 44 Ark. 178 (1884); *Block v. Valley Mut. Ins. Co.*, 52 Ark. 340, 12 S.W. 702 (1889).

This section does not give the court authority to render summary judgment against appellant in favor of his sureties who have paid the judgment. *Prairie Creek Coal Mining Co. v. Kittrell*, 107 Ark. 361, 155 S.W. 496 (1913).

A motion for summary judgment on supersedeas bond for rent which accrued during the pendency of appeal from judgment for possession in unlawful detainer suit, the response thereto and the trial thereon, was held to amount to a suit at law on the bond in question. *Dover v. Henderson*, 197 Ark. 971, 125 S.W.2d 798 (1939).

When judgment in unlawful detainer suit awarding possession to plaintiffs was affirmed, the liability of the principal and sureties on the supersedeas bond became fixed, but the extent of their liability and the amount of plaintiff's recovery for rents or damages must be tested by an action at law on the bond. *Dover v. Henderson*, 197 Ark. 971, 125 S.W.2d 798 (1939).

Where judgment was rendered against real estate broker and company which had undertaken to see that any judgment against broker would be paid, the company upon payment of the judgment was subrogated to the rights of the payee to collect on supersedeas bond when judgment against broker was affirmed. *Manufacturers Cas. Ins. Co. v. Wilhelm*, 231 Ark. 55, 328 S.W.2d 270 (1959).

Cited: *Boyd v. Jones*, 44 Ark. 314 (1884); *Palmer v. Carden*, 239 Ark. 336, 389 S.W.2d 428 (1965); *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106 (1977); *Rawlings v. State*, 284 Ark. 446, 683 S.W.2d 223 (1985); *Gipson v. Munson*, 296 Ark. 160, 752 S.W.2d 752 (1988); *Paslay v. Arkansas Dep't of Human Servs.*, 75 Ark. App. 19, 53 S.W.3d 67 (2001).

16-67-326. Affirmance of judgment — Effect.

(a) Upon the affirmance of a judgment, order, or decree of a court for the payment of money or delivery of personal property, the appellee may file in the clerk's office of the court a copy of the mandate of affirmance upon which the clerk shall endorse the time of filing, and thereupon such writs of execution may be issued on the judgment, order, or decree as could be issued after the mandate had been entered in the court.

(b) Upon the affirmance of a judgment, order, or decree for the payment of money, the collection of which in whole or in part has been superseded as provided in §§ 16-67-302, 16-67-317 — 16-67-321, 16-67-324, 16-67-326(a), 16-67-327, and 16-67-330 — 16-67-332, ten percent (10%) damages on the amount superseded may be awarded at the discretion of the court against the appellant in cases where appeal was taken for delay.

History. Civil Code, §§ 884, 887; Acts 1873, No. 88, § 1[884], p. 213; 1891, No. 159, § 1, p. 280; C. & M. Dig., §§ 2172, 2175; Pope's Dig., §§ 2781, 2784; A.S.A. 1947, §§ 27-2148, 27-2149.

CASE NOTES

Recoverability of Penalty.

Where no judgment for the recovery of money is rendered against an appellant either in the circuit court or the Supreme Court, the sureties on his supersedeas bond are not liable to pay the ten per centum damages provided by this section. *Block v. Valley Mut. Ins. Co.*, 52 Ark. 340, 12 S.W. 702 (1889).

Where case presents none of the appearance of an appeal prosecuted for delay and it appears to have been prosecuted in the utmost good faith, motion for statutory penalty provided by this section will be denied. *Missouri Pac. Transp. Co. v. George*, 200 Ark. 560, 140 S.W.2d 680 (1940).

Where question as to sufficiency of notice to terminate month to month tenancy

had not been directly considered and passed on by the Supreme Court, appeal presenting that question, though somewhat technical, was held not to justify imposition of penalty. *Dillon v. Miller*, 207 Ark. 401, 180 S.W.2d 832 (1944).

Payee of promissory note, who secured judgment against makers of note, was not entitled to recover penalty where accommodation maker appealed on issue, as to whether he was entitled to judgment against co-makers, since appeal was in good faith. *Haley v. Brewer*, 220 Ark. 511, 248 S.W.2d 890 (1952).

Cited: *Sturdivant v. Reese*, 86 Ark. 452, 111 S.W. 261 (1908); *Hollaway v. Pocahontas Fed. Sav. & Loan Ass'n*, 230 Ark. 310, 323 S.W.2d 204 (1959).

16-67-327. Reversal of judgment — Remand — Continuance.

When a case shall have been reversed and remanded by the Supreme Court for further proceedings, it may be continued at the first term unless the mandate shall have been filed with the clerk of the court below and reasonable notice given to the adverse party or his or her attorney of record before the commencement of the term, in which case it shall stand for trial unless good cause for a continuance is shown.

History. Civil Code, § 884; Acts 1873, § 1271; Pope's Dig., § 1495; A.S.A. 1947, No. 88, § 1[884], p. 213; C. & M. Dig., § 27-2151.

CASE NOTES

ANALYSIS

Failure to appear.
Reasonable notice.

Failure to Appear.

Appellants having failed to appear at

the first term of court after remand for further proceedings by the Supreme Court and ask for a continuance were not in a position to complain that the case was heard. *Pope v. Shannon Bros.*, 195 Ark. 770, 114 S.W.2d 1 (1938).

Reasonable Notice.

A party cannot complain if it had reasonable notice and the court continued the

cause until the next term. *Soudan Planting Co. v. Stevenson*, 100 Ark. 384, 140 S.W. 271 (1911).

16-67-328. Remand of case for insufficient facts in special verdict.

When the facts in a special verdict are insufficiently found, the Supreme Court may remand the cause and order another trial to ascertain the facts.

History. Rev. Stat., ch. 117, § 37; C. & M. Dig., § 2180; Pope's Dig., § 2789; A.S.A. 1947, § 27-2152.

16-67-329. Rights of appellant on reversal.

If any judgment of the circuit court is reversed by the Supreme Court on writ of error or appeal, and the judgment has been carried into effect before the reversal thereof, the defendant may recover from the plaintiff in the judgment the full amount paid thereon, including costs, by an action for so much money had and received to his or her use.

History. Rev. Stat., ch. 117, § 42; C. & M. Dig., § 2181; Pope's Dig., § 2790; A.S.A. 1947, § 27-2153.

CASE NOTES**ANALYSIS**

Accounting.
Exclusivity of remedy.
Motion for restitution.

erty or fund is in the possession or control of the person in whose favor the judgment was rendered. *Dodson v. Butler*, 101 Ark. 416, 142 S.W. 503 (1912).

Accounting.

Where court in reversing decree in favor of officer of corporation held that officer could only recover the amount paid for mortgage, officer was required to account on basis of bid for property where property itself could not be returned. *Mothershead v. Douglas*, 219 Ark. 457, 243 S.W.2d 761 (1951).

Motion for Restitution.

On remand trial judge was right in treating defendant's motion for restitution as a motion for judgment and granting relief, and there was no reason for the trial judge to delay the award until a retrial merely to permit a possible setoff against any judgment that might be recovered by the plaintiffs. *Lowe v. Morrison*, 270 Ark. 668, 606 S.W.2d 569 (1980).

Exclusivity of Remedy.

The remedy given by this section is not the sole remedy where the specific prop-

Cited: *Peek Planting Co. v. W.H. Kennedy & Sons*, 257 Ark. 669, 519 S.W.2d 49 (1975).

16-67-330. Error which can be corrected on motion in lower court not ground for reversal.

A judgment or final order shall not be reversed for an error which can be corrected on motion in the inferior courts until the motion has been made there and overruled.

History. Civil Code, § 886; C. & M. Dig., § 2174; Pope's Dig., § 2783; A.S.A. 1947, § 27-2154.

CASE NOTES

ANALYSIS

Exhaustion of remedies.
Failure to appear.
Motion to correct error.
Objection.

Exhaustion of Remedies.

Where appellant asked the Supreme Court to interpret and establish the meaning of an order of the chancery court releasing the defendant from all further monthly payments, it was held that since he had not asked the chancery court to make the order clear, his appeal was required to be dismissed for failure to exhaust his remedies in the chancery court. *Beard v. Beard*, 207 Ark. 863, 183 S.W.2d 44 (1944).

Failure to Appear.

Defendants who failed to appear and ask relief are not entitled to have decree making a distribution among those asking relief reversed, since the error, if any, could have been corrected in the trial court on motion. *Boone County Bank v. Byrum*, 68 Ark. 71, 56 S.W. 532 (1900).

Motion to Correct Error.

Where the commissioner is ordered to

pay costs and taxes out of the purchase money, the order will not be reversed in the absence of a motion to correct it. *Miners Bank v. Churchill*, 141 Ark. 211, 216 S.W. 695 (1919).

Objection.

An alleged erroneous ruling or order will not be reviewed on appeal unless a party makes known to the trial court the action which he desires the court to take or his objections to the action of the court and his grounds therefor. *Turkey Express, Inc. v. Skelton Motor Co.*, 246 Ark. 739, 439 S.W.2d 923 (1969).

Where no objection was made to court's action in declaring a mistrial, appellant was not in a position to question the propriety or legality of the declaration. *Smith v. Cummins*, 249 Ark. 61, 458 S.W.2d 140 (1970).

Where appellant did not make any objection to the verdict in any form or seek relief before the trial court, appellant could not challenge the sufficiency of the evidence for the first time on appeal. *Neugebauer v. Marlin*, 268 Ark. 1070, 598 S.W.2d 446 (Ct. App. 1980).

Cited: *Shinn v. State*, 93 Ark. 290, 124 S.W. 263 (1910).

16-67-331. Enforcement of mandate by fine and imprisonment.

The Supreme Court shall have power to enforce its mandates upon inferior courts and officers by fine and imprisonment, which imprisonment may be continued until they are obeyed.

History. Civil Code, § 885; C. & M. Dig., § 2173; Pope's Dig., § 2782; A.S.A. 1947, § 27-2155.

16-67-332. Petitions for rehearing.

(a) If a petition for rehearing is filed before the time for the decision to become final, as is specified in § 16-67-324, all proceedings upon the decision and mandate therein shall be suspended until petition for rehearing shall be acted upon by the court.

(b)(1) However, the court in term time, or a judge thereof in vacation, may enlarge the time for filing petitions for rehearing, not exceeding thirty (30) additional days, and order that all proceedings upon the

decision be stayed during such time. But the party applying for an extension or enlargement of the time for filing a petition for rehearing must do so within fifteen (15) judicial days from the time the decision was rendered and show good cause for the enlargement. Reasonable notice of the application must be first given the opposite party or his attorney of record.

(2) Any order for an extension of time made by a judge of the court shall be subject to the order of the court.

History. Civil Code, § 883; Acts 1913, No. 62, § 1; C. & M. Dig., § 2171; Pope's Dig., § 2777; A.S.A. 1947, § 27-2142.

CHAPTER 68
COSTS AND BONDS

SUBCHAPTER.

- 1. GENERAL PROVISIONS. [RESERVED.]
- 2. BONDS GENERALLY.
- 3. BONDS FOR COSTS.
- 4. COSTS GENERALLY.
- 5. FEES AND FEE BILLS.
- 6. INCARCERATED PERSONS.

Publisher's Notes. Some provisions of this chapter may be superseded by the Arkansas Rules of Civil Procedure, Rules of Appellate Procedure, and Rules for In-

ferior Courts [now District Courts] pursuant to the Supersession Rule adopted by the Supreme Court of Arkansas in its order of December 18, 1978.

RESEARCH REFERENCES

ALR. Continuance of civil case as conditioned upon applicant's payment of costs or expenses incurred by other party. 9 ALR 4th 1144.

Allocation of defense costs between pri-

mary and excess insurance carriers. 19 ALR 4th 107.

Recovery of damages resulting from wrongful issuance of injunction as limited to amount of bond. 30 ALR 4th 273.

SUBCHAPTER 1 — GENERAL PROVISIONS

[Reserved]

SUBCHAPTER 2 — BONDS GENERALLY

SECTION.

16-68-201. Surety bond required in suits against Treasurer of State or Auditor of State.

SECTION.

16-68-202. Married women — Authority to execute bonds — Liability.

SECTION.

16-68-203. Sureties.

16-68-204. Bonds not void for want of form.

SECTION.

16-68-205. New bond to replace defective bond.

Cross References. Bail generally, § 16-84-101 et seq.

Effective Dates. Acts 1857, § 2, p. 135: effective on passage.

Acts 1873, No. 126, § 12: effective on passage.

Acts 1949, No. 151, § 2: approved Feb. 23, 1949. Emergency clause provided: "Whereas, there is constantly being filed suits against the State Treasurer and Auditor involving moneys available for turn back to cities, counties, etc., which, when once in court 'tie-up' funds which under our existing laws should be distributed at specified times and in specified amounts; and

"Whereas, these funds must be set aside until such times as the courts rule on said suits; and

"Whereas, it is found that because of these many suits there is often moneys set aside pending litigation which should be turned back to the various local agencies and because of said suits the county judges, city officials and others are being deprived of the use of these moneys for lengthy periods of time;

"Therefore, this Act being necessary for the preservation of the public peace, health and safety, an emergency is declared to exist and this Act shall take effect from and after passage."

16-68-201. Surety bond required in suits against Treasurer of State or Auditor of State.

In any suit brought against the Treasurer of State and Auditor of State prohibiting them from disbursing certain moneys due cities, counties, improvement districts, etc., the plaintiff or his or her attorneys shall be required to file surety bond with the Auditor of State in the amount of ten percent (10%) of the moneys involved in the suits, and the bond shall remain in force until final disposition of the suits.

History. Acts 1949, No. 151, § 1; A.S.A. 1947, § 27-2207.

16-68-202. Married women — Authority to execute bonds — Liability.

In case it shall be necessary in the prosecution or defense of any action brought by or against a married woman to enter into any bond or undertaking, the bond or undertaking may be executed by the married woman with the same effect in all respects as if she were sole. If the bond or undertaking becomes broken or forfeited, the bond or undertaking may be enforced against her separate property.

History. Acts 1873, No. 126, § 9, p. 382; C. & M. Dig., § 5587; Pope's Dig., § 7237; A.S.A. 1947, § 27-2206.

16-68-203. Sureties.

(a) The surety in every bond provided for by this code must be a resident of this state and worth double the sum to be secured beyond the amount of his or her debts and have property in this state liable to execution equal to the sum to be secured. Where there are two (2) or more sureties in the same bond they must, in the aggregate, have the qualifications prescribed in this subsection.

(b) No attorney, clerk, sheriff, or other person concerned in the execution of any process, shall become bail in any civil case.

(c)(1) The ministerial officer whose duty it is to take a surety in any bond provided for by this code shall have the right to require the person offered as surety to make affidavit of his or her qualification, which affidavit may be made before the officer. However, any person interested may contest the sufficiency of the surety upon the making of the affidavit.

(2) If it is made to appear that the surety is not sufficient, then an officer who in good faith complies with this subsection shall be exempt from any liability to which he or she might otherwise be subject for taking insufficient surety.

History. Rev. Stat., ch. 116, § 23; Civil Code, §§ 786, 787; C. & M. Dig., §§ 798-800; Pope's Dig., §§ 954-956; Acts 1963, No. 487, § 1; A.S.A. 1947, §§ 27-2203 — 27-2205; Acts 2003, No. 1185, § 205.

Publisher's Notes. This section may be affected by Ark. Const. Amend. 4.

The code referred to in this section means the Code of Practice in Civil Cases

of 1869. See parallel reference tables in tables volume.

Amendments. The 2003 amendment deleted "solicitor, or counsellor at law or in equity" following "No attorney" in (b).

Cross References. Sureties on official bond, Ark. Const. Art. 19, § 21, Amend. No. 4.

Surety companies, § 23-63-1001 et seq.

16-68-204. Bonds not void for want of form.

The bond of no executor or executrix, administrator or administratrix or guardian, nor any prosecution, appeal, nonresident, or attachment bond, nor any other statutory bonds of any party, plaintiff, or defendant in any court of justice in this state, nor any recognizance in any criminal cause in this state, shall be declared null and void for the want of form if the intent of the bond can be plainly deduced from the body of the bond or recognizance.

History. Acts 1857, § 1, p. 135; C. & M. Dig., § 801; Pope's Dig., § 957; A.S.A. 1947, § 27-2201.

16-68-205. New bond to replace defective bond.

When any bond provided for by this code is adjudged to be defective, a new and sufficient one may be executed in such reasonable time as the court may fix, with the same effect as if originally executed.

History. Civil Code, § 785; C. & M. Dig., § 797; Pope's Dig., § 953; A.S.A. 1947, § 27-2202.

Publisher's Notes. The code referred

to in this section means the Code of Practice in Civil Cases of 1869. See parallel reference tables in the tables volume.

CASE NOTES

Amendment.

A bond for appeal to the circuit court in proper form though not signed by the sureties was subject to amendment. Fair-

view School Dist. No. 7 v. Mammoth Spring School Dist. No. 2, 189 Ark. 74, 70 S.W.2d 502 (1934).

SUBCHAPTER 3 — BONDS FOR COSTS

SECTION.

- 16-68-301. Persons required to give bond for costs — Deposit in lieu of bond — Dismissal of action for noncompliance.
- 16-68-302. Bond required if plaintiff becomes a nonresident.
- 16-68-303. Bond required of guardian, next friend, or assignee.

SECTION.

- 16-68-304. State not required to give security for costs.
- 16-68-305. Requirement of additional security.
- 16-68-306. Liability of attorney when bond not given.

RESEARCH REFERENCES

Am. Jur. 20 Am. Jur. 2d, Costs, § 37 et seq.

C.J.S. 20 C.J.S., Costs, § 125 et seq.

16-68-301. Persons required to give bond for costs — Deposit in lieu of bond — Dismissal of action for noncompliance.

(a) Before commencing an action, a plaintiff who is a nonresident of this state or a corporation other than a bank created by the laws of this state shall file in the clerk's office a bond, with sufficient surety and to be approved by the clerk, for the payment of all costs which may accrue in the action in the court in which it is brought or in any other court to which it may be carried, either to the defendant or to the officers of the courts.

(b) Instead of filing a bond, the plaintiff may deposit with the clerk of the court a sum of money sufficient to pay all costs that have accrued or will probably accrue in the action, subject to the sum's being increased at any time the court may deem necessary and by its order required.

(c) An action in which a bond for costs is required by subsection (a) of this section and has not been given shall be dismissed on the motion of the defendant at any time before the judgment, unless the bond is filed in a reasonable time to be allowed by the court after the motion is made therefor, securing all past and future costs. The action shall not be dismissed or abated if a bond for costs is given in such time as the court may allow.

History. Civil Code, §§ 698, 699; C. & M. Dig., §§ 1844, 1845; Pope's Dig., §§ 2363, 2364; Acts 1941, No. 344, § 1; A.S.A. 1947, §§ 27-2301, 27-2302.

CASE NOTES

ANALYSIS

In general.
Cash deposit.
Deposit insufficient.
Failure to give bond.
Nonresident.
Surety.
Timeliness of objection.

In General.

Bond not in statutory form is a good common-law bond. *Munzesheimer v. Byrne*, 56 Ark. 116, 19 S.W. 320 (1892).

A bond may be required to secure costs of appeal. *Chambers v. Ogle*, 114 Ark. 237, 169 S.W. 795 (1914).

Cash Deposit.

There is substantial compliance with this section when plaintiff at the time of commencing an action makes a cash deposit sufficient to cover the costs then accrued. *Harral v. Helton*, 230 Ark. 913, 327 S.W.2d 549 (1959).

Deposit Insufficient.

Where the deposit is insufficient the trial court may require plaintiff to increase it, but the trial court's failure to do so is not sufficient ground for dismissing the cause of action. *Harral v. Helton*, 230 Ark. 913, 327 S.W.2d 549 (1959).

Failure to Give Bond.

Suit against nonresident corporation will not be dismissed for failure to give bond on appeal if none was asked below. *Adair v. Quincy Stove Mfg. Co.*, 119 Ark. 263, 177 S.W. 909 (1915).

In an action on a note against the appellant by the appellee, the appellant may, at any time before judgment, require the appellee to give a bond for costs or have the suit dismissed, but the appellant's failure to give a bond is unavailing on appeal when the record fails to show the appellee asked for a dismissal, because of the failure to give bond. *Adair v. Quincy Stove Mfg. Co.*, 119 Ark. 263, 177 S.W. 909 (1915).

Failure of chancery court to require nonresident to make bond in habeas corpus proceeding to regain custody of her

children even if it constituted error was harmless where the nonresident prevailed both in lower court and on appeal. *Fulks v. Walker*, 225 Ark. 390, 283 S.W.2d 347 (1955).

Failure to file the proper cost bond at the proper time is a matter of abatement and does not go to the merits of the case. *Harral v. Helton*, 230 Ark. 913, 327 S.W.2d 549 (1959).

Nonresident.

This section does not apply to nonresident who sues as administratrix and who has given bond as administratrix in this state. *Warren & O.V.R.R. v. Waldrop*, 93 Ark. 127, 123 S.W. 792 (1909).

A nonresident intervenor seeking to set aside the sale of property held under execution of judgment is for all practical purposes a plaintiff and must give the bond required by this section. *Charlesworth Pontiac Co. v. Walker*, 238 Ark. 940, 385 S.W.2d 797 (1965).

A nonresident intervenor, who gave no bond, in seeking to set aside a sale held under execution of judgment was for all practical purposes a plaintiff and the cause should have been dismissed. *Charlesworth Pontiac Co. v. Walker*, 238 Ark. 940, 385 S.W.2d 797 (1965).

Surety.

Under cost bond of nonresident plaintiff given under and in the language of this section, the surety continues liable for costs accruing after death of plaintiff and revivor of the action in the name of his special administrator appointed under § 16-62-106; the latter being relieved from liability for costs by § 16-62-106(d). *United States Fid. & Guar. Co. v. St. Louis, I.M. & S. Ry.*, 135 Ark. 1, 204 S.W. 416 (1918).

Timeliness of Objection.

Motion by plaintiff to dismiss petition of intervenor for failure to file bond, which was filed after judgment in favor of plaintiff, was filed too late. *Mothershead v. Douglas*, 219 Ark. 457, 243 S.W.2d 761 (1951).

Cited: *Levi Strauss & Co. v. Crockett Motor Sales, Inc.*, 293 Ark. 502, 739 S.W.2d 157 (1987).

16-68-302. Bond required if plaintiff becomes a nonresident.

If the plaintiff in an action, after its institution, becomes a nonresident of this state, he or she shall give security for costs, in the manner and under the restrictions provided for in § 16-68-301.

History. Civil Code, § 700; C. & M. Dig., § 1846; Pope's Dig., § 2365; A.S.A. 1947, § 27-2303.

CASE NOTES

ANALYSIS

Administration of estates.
Intervenors.

Administration of Estates.

This section had no application to an administratrix appointed in this state. *Warren & O.V.R.R. v. Waldrop*, 93 Ark. 127, 123 S.W. 792 (1909).

Intervenors.

In suit, court was not authorized to require intervenors to deposit moneys into court to cover portion of costs and expenses of court-appointed master. *State ex rel. Purcell v. Nelson*, 246 Ark. 210, 438 S.W.2d 33 (1969).

16-68-303. Bond required of guardian, next friend, or assignee.

A guardian or next friend suing for an infant or person of unsound mind, and every plaintiff suing as an assignee, except an endorsee of a bill of exchange or a promissory note placed on the footing of a bill of exchange, when insolvent, may be required to give security for costs. On the failure to give security for costs within a reasonable time after it is directed by the court, upon the motion of the defendant, his or her action shall be dismissed.

History. Civil Code, § 701; C. & M. Dig., § 1847; Pope's Dig., § 2366; A.S.A. 1947, § 27-2305.

CASE NOTES

Assignee.

An administrator is not an assignee

within this section. *Tucker v. West*, 31 Ark. 643 (1877).

16-68-304. State not required to give security for costs.

The state shall not be required or ruled to give security for costs in any case whatever, in any court.

History. Acts 1855, § 7, p. 196; C. & M. Dig., § 9296; Pope's Dig., § 11982; A.S.A. 1947, § 27-2307.

Cross References. Appeal from writ of mandamus or prohibition, § 16-115-109.

CASE NOTES

ANALYSIS

Costs.
Counties.

Costs.

Master's fees and expenses are costs within the meaning of this section. State ex rel. Purcell v. Nelson, 246 Ark. 210, 438 S.W.2d 33 (1969).

Counties.

In action by the state for the use and benefit of a county against foreign corporation to recover statutory penalty for doing business in the state without qual-

ifying under statutes, denial of corporation's motion to quash attachment of truck on ground that the state failed to make affidavit and execute bond was held not error, since the state is not required to give bond or security for costs in any case nor is it required to verify its pleadings. Vaccinol Prods. Corp. v. State ex rel. Phillips County, 203 Ark. 302, 156 S.W.2d 250 (1941).

Cited: Wimberly v. State, 90 Ark. 514, 119 S.W. 668 (1909); McCastlain v. Oklahoma Gas & Elec. Co., 243 Ark. 506, 420 S.W.2d 893 (1967).

16-68-305. Requirement of additional security.

In an action in which a bond for costs has been given, the defendant, at any time before judgment and after reasonable notice to the plaintiff, may move the court for additional security on the part of the plaintiff. If, on the motion, the court is satisfied that the surety in the plaintiff's bond has removed from the state, or is not sufficient for the amount of the bond, it may dismiss the action, unless, in a reasonable time to be fixed by the court, sufficient security is given by the plaintiff.

History. Civil Code, § 702; C. & M. Dig., § 1848; Pope's Dig., § 2367; A.S.A. 1947, § 27-2306.

16-68-306. Liability of attorney when bond not given.

When process is issued in an action by the direction of an attorney for a plaintiff who is required by § 16-68-301 to give security for costs, but who has failed to do so, the attorney shall be liable as surety for the costs of the action until a bond is given. The attorney's liability may be enforced by orders of court and by proceedings as for contempt if they are not obeyed.

History. Civil Code, § 703; C. & M. Dig., § 1849; Pope's Dig., § 2368; A.S.A. 1947, § 27-2304.

CASE NOTES

Signature.

Attorneys may sign cost bond. Kansas City S. Ry. v. Miller, 117 Ark. 396, 175 S.W. 1164 (1915).

Cited: Fulks v. Walker, 225 Ark. 390, 283 S.W.2d 347 (1955).

SUBCHAPTER 4 — COSTS GENERALLY

SECTION.

- 16-68-401. Actions of trespass.
 16-68-402. Recovery below court's jurisdiction.
 16-68-403. Tender of full payment by defendant — Costs.
 16-68-404. Costs when action unsuccessful against part of several defendants.
 16-68-405. Suits for use of another — Liability to plaintiff for costs.

SECTION.

- 16-68-406. Action in name of married woman — Liability for costs.
 16-68-407. Judgment against security, attorney, or usee on motion.
 16-68-408. [Repealed.]
 16-68-409. Taxation of costs — No charge for service not performed.
 16-68-410. Execution for costs.

Cross References. Additional costs taxed for justice building, § 19-5-1052.

Effective Dates. Acts 1873, No. 126, § 12: effective on passage.

Acts 1991, No. 904, § 28: Mar. 29, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that the language of certain court cost statutes lacks uniformity; that such lack of uniformity is detrimental to the

proper collection of such court costs; and that such language should be standardized to promote the proper collection of such costs. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

Am. Jur. 20 Am. Jur. 2d, Costs, § 1 et seq.

C.J.S. 20 C.J.S., Costs, § 1 et seq.

16-68-401. Actions of trespass.

In all actions of trespass, if any damages are found for the plaintiff upon the trial of the issue or inquiry of damages, he or she shall recover his or her costs.

History. Rev. Stat., ch. 34, § 20; C. & M. Dig., § 1836; Pope's Dig., § 2355; A.S.A. 1947, § 27-2309.

16-68-402. Recovery below court's jurisdiction.

In all actions other than trespass which may be prosecuted in any court, the subject matter of which shall be cognizable before the court, but the damages recovered shall be below the jurisdiction of the court, the plaintiff shall recover his costs.

History. Rev. Stat., ch. 34, § 20; C. & M. Dig., § 1836; Pope's Dig., § 2355; A.S.A. 1947, § 27-2309.

16-68-403. Tender of full payment by defendant — Costs.

In all actions where tender is made and full payment offered, by discount or otherwise, in such specie as the party by contract or agreement ought to take, and the party to whom the tender is made refuses it and afterwards sues for the debt or goods so tendered, the plaintiff shall not recover costs in the suit, but the defendant shall recover costs in the same manner as if the judgment had been rendered in his or her favor on the merits of the case.

History. Rev. Stat., ch. 34, § 29; C. & M. Dig., § 1843; Pope's Dig., § 2362; A.S.A. 1947, § 27-2311.

CASE NOTES**Tender.**

The effect of a tender is to save costs; but, in order to be availing, it must be

followed up and the money brought into court. *Hamlett v. Tallman & Graves*, 30 Ark. 505 (1875).

16-68-404. Costs when action unsuccessful against part of several defendants.

When several persons are made defendants to any action of trespass, assault and battery, false imprisonment, detinue, replevin, trover, or ejectment, and one (1) or more of them is acquitted, every person so acquitted shall recover his or her costs in the same manner as if the verdict of acquittal had been in favor of all the defendants, unless it is certified by the court that there was reasonable cause for making the person a defendant to the action.

History. Rev. Stat., ch. 34, § 18; C. & M. Dig., § 1837; Pope's Dig., § 2356; A.S.A. 1947, § 27-2313.

16-68-405. Suits for use of another — Liability to plaintiff for costs.

When a suit is commenced in the name of one person to the use of another, the person for whose use the action is brought shall be liable for the payment of all costs which the plaintiff may be adjudged to pay, and execution may be issued therefor.

History. Rev. Stat., ch. 34, § 27; C. & M. Dig., § 1838; Pope's Dig., § 2357; A.S.A. 1947, § 27-2317.

CASE NOTES**Mortgage Foreclosure.**

This section is not applicable to suit to foreclose mortgage, though alleged to be a

community suit. *First Nat'l Bank v. Scranton Coal Co.*, 178 Ark. 643, 12 S.W.2d 6 (1928).

16-68-406. Action in name of married woman — Liability for costs.

In an action brought or defended by any married woman, in her name, neither her husband nor his property shall be liable for the costs thereof, or the recovery therein. In an action brought by her for an injury to her person, character, or property, if judgment passes against her for costs, the court in which the action is pending shall have jurisdiction to enforce payment of the judgment out of her separate estate or property.

History. Acts 1873, No. 126, § 6, p. 382; C. & M. Dig., § 5584; Pope's Dig., § 7234; A.S.A. 1947, § 27-2318.

16-68-407. Judgment against security, attorney, or usee on motion.

In all cases where there is security for costs or where the attorney is liable for costs or where the action is brought to the use of another, in which the plaintiff is adjudged to pay the costs, judgment may be rendered against the security, attorney, or person for whose use the action was brought on motion of the party entitled to the costs, notice of the motion having first been given to the security, attorney, or other person.

History. Rev. Stat., ch. 34, § 33; C. & M. Dig., § 1841; Pope's Dig., § 2360; A.S.A. 1947, § 27-2327.

16-68-408. [Repealed.]

Publisher's Notes. This section, concerning costs on appeal, was repealed by Acts 2003, No. 1185, § 206. The section was derived from Rev. Stat., ch. 34, §§ 21,

22, 24; C. & M. Dig., §§ 1856-1858; Pope's Dig., §§ 2375-2377; A.S.A. 1947, §§ 27-2314 — 27-2316.

16-68-409. Taxation of costs — No charge for service not performed.

(a)(1) The clerk shall tax and subscribe all bills of costs arising in any cause or proceedings instituted or adjudged in the court of which he or she is clerk, corresponding to the fees which shall, for the time being, be allowed by law.

(2) The clerk shall in no case allow any item or charge, unless the service for which it was made was actually performed in the cause.

(b) Any person aggrieved by the taxation of any bill of costs may upon application have the bill of costs retaxed by the court in which the action or proceeding was had, and in the retaxation, all errors shall be corrected by the court.

History. Rev. Stat., ch. 34, §§ 28, 30; C. & M. Dig., §§ 1859, 1860; Pope's Dig., §§ 2378, 2379; A.S.A. 1947, §§ 27-2319, 27-2320; Acts 1991, No. 904, § 19.

Publisher's Notes. Acts 1991, No. 904, § 22, provided: "It is hereby found that the passage of many court cost bills over several legislative sessions has caused confusion in the collection of such costs and that reasonable people can interpret the varying language of such court costs statutes differently. This legislation is

necessary to standardize the language of such court cost statutes to provide that such costs are collected in a uniform manner statewide."

Acts 1991, No. 904, § 23, provided: "This act is hereby declared to be remedial in nature and is to be liberally construed to effect its purpose."

Acts 1991, No. 904, § 24, provided: "Nothing herein shall prohibit courts from assessing reasonable probation fees."

CASE NOTES

ANALYSIS

Discretion of court.

Motion to retax.

Reasonable time.

Discretion of Court.

It is within the power of the circuit court, in the exercise of a sound discretion, to disallow to the plaintiff any costs which he has caused unreasonably and unnecessarily to be accumulated; and the judgment of the court below, in the exercise of the discretion, should not be overruled by this court, except in cases of manifest error and abuse of power. *Meadows v. Rogers*, 17 Ark. 361 (1856); *Davies v. Robinson*, 65 Ark. 219, 45 S.W. 471 (1898).

Motion to Retax.

Actions by deputy sheriff to recover costs in prior suit cannot be treated as motion to retax costs in the prior suit. *Hudgins v. Beavers*, 69 Ark. 577, 65 S.W. 99 (1901).

Reasonable Time.

Motion to retax costs filed after appellate court had affirmed the judgment, was held filed within a reasonable time and properly entertained since the motion questioned items of costs definitely fixed by law. *Lewis v. D.F. Jones Constr. Co.*, 194 Ark. 602, 108 S.W.2d 1093 (1937).

Cited: *Troutt v. Langston*, 283 Ark. 220, 675 S.W.2d 625 (1984); *McKinney v. City of El Dorado*, 308 Ark. 284, 824 S.W.2d 826 (1992).

16-68-410. Execution for costs.

(a) In all cases where costs are given by this act, the party to whom the costs are adjudged may have execution therefor.

(b) In all cases where either party is adjudged to pay costs before final judgment, the party in whose favor the costs are adjudged may have execution therefor immediately, as upon final judgment.

History. Rev. Stat., ch. 34, §§ 31, 32; C. & M. Dig., §§ 1839, 1840; Pope's Dig., §§ 2358, 2359; A.S.A. 1947, §§ 27-2325, 27-2326.

Meaning of "this act". Rev. Stat., ch. 34, codified as §§ 16-68-401 — 16-68-405, 16-68-407, and 16-68-409 — 16-68-410.

Cross References. Execution may issue for recovery of costs, § 16-66-101.

Failure to take out mandate after decision on appeal, execution for costs, § 16-67-325.

SUBCHAPTER 5 — FEES AND FEE BILLS

SECTION.

- 16-68-501. Advance payment of fees — Recovery as costs — Unpaid fees — Endorsement on execution.
- 16-68-502. Fees of officers endorsed on execution — Fee book.
- 16-68-503. Fee bills of officers and witnesses.
- 16-68-504. Collection of fee bill.

SECTION.

- 16-68-505. Failure of sheriff to collect — Judgment against sheriff.
- 16-68-506. Pro rata division of fees when entire costs not collected.
- 16-68-507. Suits by state — Payment of officer's fees.
- 16-68-508. Suits by state — Payment of costs and fees in frivolous civil actions.

Effective Dates. Acts 1842, § 36, p. 27: Jan. 1, 1843.

Acts 1843, § 3, p. 68: effective on passage.

Acts 1871, No. 48, § 1 [890]: effective 90 days after passage.

RESEARCH REFERENCES

Am. Jur. 20 Am. Jur. 2d, Costs, § 52 et seq.

C.J.S. 20 C.J.S., Costs, § 184 et seq.

16-68-501. Advance payment of fees — Recovery as costs — Unpaid fees — Endorsement on execution.

If any party to a suit pays any fees allowed by this act before final judgment and the judgment is thereafter rendered in his or her favor and costs adjudged to him or her, the amount so paid shall be taxed and endorsed on the execution and levied and collected by virtue thereof for the benefit of the party. All fees which have not been paid shall be endorsed on the execution and collected by virtue thereof for the benefit of the person rendering the service, or the fee may be collected on fee bills according to § 16-68-503, but only the costs of the prevailing party shall be so taxed on the execution.

History. Acts 1842, § 31, p. 27; C. & M. Dig., § 4628; Pope's Dig., § 5717; A.S.A. 1947, § 27-2321.

Meaning of "this act". Acts 1842, p. 27 codified as §§ 16-58-117, 16-68-501 — 16-68-503, 16-68-505, 21-6-102 — 21-6-105.

CASE NOTES

Cited: *Buchanan v. Parham*, 95 Ark. 81, 128 S.W. 563 (1910).

16-68-502. Fees of officers endorsed on execution — Fee book.

(a) The clerks of the several courts shall endorse on every execution which they shall issue the fees due to each officer and any other person.

(b) The clerks, at the time of issuing an execution or fee bill or of recovering any fees due to them by any party or other person, shall

enter in a book, to be kept for that purpose, the several items for which they have charged, using words of full length.

(c) Every clerk shall deliver to any party or person to whom any fees are due, on demand, a full and complete copy of the entry made in the book, without any compensation for the copy.

(d) When any suit is instituted against any clerk or officer for having asked or taken illegal fees, the book referred to in subsections (b) and (c) of this section, and the entries therein, may be given in evidence on the trial.

History. Acts 1842, §§ 32-34, p. 27; C. §§ 5718-5720; A.S.A. 1947, §§ 27-2322 — & M. Dig., §§ 4629-4631; Pope's Dig., 27-2324.

16-68-503. Fee bills of officers and witnesses.

(a) All officers and witnesses entitled to fees by the law for services rendered in any suit, matter, or controversy pending in any court of record may make out fee bills for the services at the end of each term of the court wherein the suit, matter, or controversy is pending, charging the party at whose instance the services were rendered.

(b) The fee bill shall be examined by the clerk of the court in which the services were rendered. If found correct, the clerk shall certify the fee bill and deliver the fee bill to the sheriff of the proper county to be collected by him or her.

History. Acts 1842, §§ 27, 28, p. 27; C. §§ 5707, 5709; A.S.A. 1947, §§ 27-2328, & M. Dig., §§ 4618, 4619; Pope's Dig., 27-2329.

CASE NOTES

Construction.

This section must be strictly construed. The fee bill must show, upon its face, that the party claiming the fees is one of the classes of persons specified in the act; otherwise it is void, and may be super-

seded. *Ex parte Ashley*, 3 Ark. 63 (1840); *Ex parte Badgett*, 6 Ark. 280 (1845); *Ex parte Lawson*, 11 Ark. 323 (1850).

Cited: *Buckley v. Williams*, 84 Ark. 187, 105 S.W. 95 (1907); *Edwards v. Thayer*, 122 Ark. 579, 184 S.W. 64 (1916).

16-68-504. Collection of fee bill.

When any fee bill shall come to the hands of any sheriff or other officer to be collected, and the person against whom the fee bill is issued refuses or fails to pay the amount of the fee bill within twenty (20) days after the fee bill shall be presented, the sheriff or other officer may and shall levy the fee bill and the amount claimed thereon on the goods and chattels of the person or persons and expose the goods and chattels for sale within sixty (60) days from the date of the levy. The sheriff or other officer shall give ten (10) days' notice of the time and place of the sale by means of at least four (4) advertisements put up in four (4) of the public places in his or her county. It is unlawful for the person or persons against whom the fee bill is issued, to delay the payment of the fee bill in any manner whatever.

History. Acts 1843, § 1, p. 68; C. & M. Dig., § 4620; Pope's Dig., § 5708; A.S.A. 1947, § 27-2330.

CASE NOTES

Sale of Land.

Land cannot be sold under a fee bill not based on a judgment or order of a court.

Minton v. Bennight, 83 Ark. 101, 103 S.W. 168 (1907).

16-68-505. Failure of sheriff to collect — Judgment against sheriff.

If any sheriff neglects or refuses to levy and collect the fees and pay over the money, when collected, to the person entitled thereto, the court shall upon motion enter up judgment for the amount of the fee bill against him or her and cause execution to issue thereon.

History. Acts 1842, § 30, p. 27; C. & M. Dig., § 4621; Pope's Dig., § 5710; A.S.A. 1947, § 27-2331.

16-68-506. Pro rata division of fees when entire costs not collected.

In case the clerk, or, if the costs in any action are collected on execution by the sheriff, then the sheriff, is unable to collect the entire amount of costs due, the clerk or sheriff shall not first retain from the amount the fees due himself or herself, but shall account for and pay the costs collected pro rata to all officers and persons entitled to any portion of the costs so collected.

History. Civil Code, § 775; Acts 1871, § 4627; Pope's Dig., § 5716; A.S.A. 1947, No. 48, § 1[775], p. 219; C. & M. Dig., § 27-2332.

16-68-507. Suits by state — Payment of officer's fees.

Whenever any civil suit is or has been prosecuted by the state and for the state's own benefit, the clerks, sheriffs, and other officers shall be entitled to the same fees as in other civil cases between private persons. Whenever the state becomes liable to pay any such costs, it shall be the duty of the Auditor of State upon presentation of the certificate of the Attorney General that the costs have accrued and that the state is liable therefor and the amount claimed is just, to draw his or her warrant on the Treasurer of State for the amount so certified to be due, which shall be paid by the Treasurer of State.

History. Acts 1850, § 3, p. 45; C. & M. Dig., § 1842; Pope's Dig., § 2361; A.S.A. 1947, § 27-2333.

16-68-508. Suits by state — Payment of costs and fees in frivolous civil actions.

(a) The defendant in any civil action brought in any court of this state by any state agency, board, or commission shall be entitled to recover from the state entity the court costs, witness fees, and reasonable attorneys' fees if the court determines that the action was brought without reasonable basis or was frivolous.

(b) The recovery of court costs, witness fees, and attorney' fees shall be limited to an aggregate total of ten thousand dollars (\$10,000).

(c) The court costs, witness fees, and attorneys' fees shall be paid from maintenance and operation funds of the state agency, board, or commission.

(d) This section shall apply to all civil actions commenced after June 28, 1985.

History. Acts 1985, No. 148, § 1;
A.S.A. 1947, § 27-2334.

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Civil
Procedure, 8 UALR L.J. 555.

SUBCHAPTER 6 — INCARCERATED PERSONS

SECTION.	SECTION.
16-68-601. Amount of fees and costs.	16-68-605. Merit of claims.
16-68-602. Additional payment.	16-68-606. Fees upon commencement or dismissal.
16-68-603. Indigency.	16-68-607. Multiple lawsuits.
16-68-604. Affidavit of inability to pay.	

16-68-601. Amount of fees and costs.

(a) If an incarcerated person, defined for purposes of this subchapter as a person who has been convicted of a crime and is imprisoned for that crime or is being held in custody for trial or sentencing, files a civil action, the court shall order the incarcerated person to pay, as a partial payment of any court filing fees and court costs required by law, a first-time payment of twenty percent (20%) of the preceding six (6) months' income from the incarcerated person's inmate account as administered by the Department of Correction or the Department of Community Correction.

(b) The Department of Correction or the Department of Community Correction shall withdraw these moneys maintained in the account for payment of the filing fees and court costs and shall forward these moneys collected at such times as the moneys exceed ten dollars (\$10.00) to the appropriate court clerk or clerks until the actual court fees are paid in full.

History. Acts 1997, No. 340, § 1.

A.C.R.C. Notes. Acts 2001, No. 323, § 1, provided: "Legislative intent. The General Assembly, in Act 549 of 1993, established the Arkansas Department of Community Punishment and delineated its purposes. Confusion in the public's perception, with regard to the purposes of the department, exists and will persist because of the inconsistency between the name of the department and its established purposes. The purpose of this act is to provide the department with a name that more accurately describes its role as an agency that is intended to fulfill the legislatively established purposes of supervision, treatment, rehabilitation, and

restoration of adult offenders as useful law-abiding citizens within the community and to provide its supervisory board with a name consistent with the department's name change."

Acts 2001, No. 323, § 2, provided: "The 'Department of Community Punishment', as established in Arkansas Code 12-27-125, shall hereafter be known as the 'Department of Community Correction'."

Acts 2001, No. 323, § 5, provided: "(a) The Arkansas Code Revision Commission shall make appropriate name changes in the Arkansas Code to implement this act.

"(b) The Arkansas Code Revision Commission is not required to codify this act."

16-68-602. Additional payment.

Nothing in this subchapter shall be construed to prevent an incarcerated person from authorizing payment beyond that required by this subchapter.

History. Acts 1997, No. 340, § 2.

16-68-603. Indigency.

Nothing in this subchapter should be construed to prohibit an incarcerated person from filing his or her civil action or proceeding if the incarcerated person is found to be indigent pursuant to the Arkansas indigency statutes.

History. Acts 1997, No. 340, § 3.

16-68-604. Affidavit of inability to pay.

(a) Any court of the State of Arkansas may authorize the commencement, prosecution, or defense of any suit, action, or proceeding, without payment of fees and costs, by an incarcerated person who makes an affidavit that he or she is unable to pay such costs or give security therefor.

(b)(1)(A) This affidavit shall contain complete information as to the incarcerated person's:

- (i) Identity;
- (ii) Nature and amount of income;
- (iii) Spouse's income, if available to the incarcerated person;
- (iv) Property owned;
- (v) Cash or checking accounts;
- (vi) Dependents;
- (vii) Debts; and
- (viii) Monthly expenses.

(B) The incarcerated person, if applicable, shall also state the amount of money deposited in his or her inmate account for the past six (6) months.

(2) The affidavit shall contain the following statements: "I, , am unable to pay the filing fees and court costs described herein. I verify that the statements made in this affidavit are true and correct."

(c) The Attorney General or other counsel for the defendant shall be authorized to receive information from the prison or jail verifying the financial information given by the incarcerated person.

History. Acts 1997, No. 340, § 4.

16-68-605. Merit of claims.

A court in which an affidavit of inability to pay has been filed may dismiss the action in whole or in part on a finding that:

(1) The allegation of poverty is false; or

(2) The action or a portion of the action lacks a justiciable issue as defined by § 16-22-309.

History. Acts 1997, No. 340, § 5.

16-68-606. Fees upon commencement or dismissal.

(a) If the court authorizes the commencement of the action and the court concludes, based on information contained in the affidavit or other information available to the court, that such person is able to pay part of the fees, costs, or security otherwise required, then the court shall order a partial payment to be made as a condition of the commencement or further prosecution of the action, provided that any such payment is not less than required under § 16-68-601. Furthermore, if the court dismisses the action for the reason that it lacks a justiciable issue, then the court may order the incarcerated person to pay reasonable attorney's fees pursuant to § 16-22-309.

(b) Furthermore, if the court dismisses the action for the reason that it lacks a justiciable issue, then the court may order the incarcerated person to pay reasonable attorney's fees pursuant to § 16-22-309.

History. Acts 1997, No. 340, § 6.

16-68-607. Multiple lawsuits.

In no event shall an incarcerated person bring a civil action or appeal a judgment in a civil action or proceeding under the Arkansas indigency statutes if the incarcerated person has on three (3) or more prior occasions, while incarcerated or detained in any facility, brought an action that is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the incarcerated person is under imminent danger of serious physical injury.

History. Acts 1997, No. 340, § 7.

CASE NOTES

In General.

Trial court correctly found that the dismissal of the inmate's civil rights complaint against prison officials would constitute a "strike" for purposes of this

section, as the complaint was dismissed for failure to state a claim upon which relief could be granted. *Fegans v. Norris*, 351 Ark. 200, 89 S.W.3d 919 (2002).

CHAPTERS 69-79

[Reserved]

SUBTITLE 6. CRIMINAL PROCEDURE GENERALLY

Publisher's Notes. Section 1 of the Preliminary Provisions of the 1869 Code of Practice in Criminal Cases, which is codified throughout this subtitle, provided that the provisions of the code would regulate proceedings in all prosecutions and penal actions in all the courts of the state and be known as the Code of Practice in Criminal Cases.

Section 214 of the 1869 code, as amended, provided that the repeal of laws inconsistent with the 1869 code did not revive any previous law or affect any existing right or proceeding already taken, except as provided by that code.

Section 410 of the 1869 code provided that the provisions of that code did not

apply to the form of indictment, or pleadings in prosecutions or penal actions pending when that code took effect.

Effective Dates. Section 411 of the Criminal Code read: "This act, known as the 'Code of Practice in Criminal Cases,' shall so far go into effect, from and after its passage, that all proceedings in pursuance of its provisions shall be valid, but no proceeding before the first day of January, 1869, shall be rendered invalid by said Code; but on the first day of January, 1869, this Code shall take effect for all purposes, after which all proceedings shall be in accordance herewith." Approved July 22, 1868.

CHAPTER 80

GENERAL PROVISIONS

SECTION.

16-80-101. [Repealed.]

16-80-102. Precedence given to criminal trials when victim under age of 14.

SECTION.

16-80-103. Disposition of stolen property.

A.C.R.C. Notes. Acts 2003, No. 1077, §§ 1 and 2, provided: "SECTION 1. Arkansas Criminal Code Revision Commission created.

"(a) There is created the Arkansas Criminal Code Revision Commission.

"(b) The commission shall consist of the following members:

"(1) The Governor or the Governor's designee;

"(2) A member of the House Judiciary Committee selected by the Speaker of the House of Representatives;

"(3) A member of the Senate Judiciary Committee selected by the President Pro Tempore of the Senate;

"(4) The Attorney General or the Attorney General's designee;

"(5) The Director of the Arkansas Sentencing Commission;

"(6) A public defender appointed by the Public Defender Commission;

"(7) The Prosecutor Coordinator or the coordinator's designee;

"(8) A practicing attorney selected by the President of the Arkansas Bar Association;

"(9) A circuit judge selected by the Chief Justice of the Arkansas Supreme Court;

"(10) A Judge of the Arkansas Court of Appeals selected by the Chief Judge of the Arkansas Court of Appeals;

"(11) A Supreme Court Justice selected by the Chief Justice of the Arkansas Supreme Court;

"(12) The Director of the Department of Correction or the director's designee;

"(13) A sheriff selected by the Arkansas Sheriff's Association;

"(14) The Director of the Department of Arkansas State Police or the director's designee;

"(15) The Director of the Department of Community Punishment or the director's designee;

"(16) A professor from the University of Arkansas School of Law selected by the dean of the law school;

"(17) A professor from the University of Arkansas at Little Rock, William N. Bowen School of Law, selected by the dean of the law school;

"(18) The Executive Director of the Arkansas Code Revision Commission or the director's designee; and

"(19) The Director of the Bureau of Legislative Research or the director's designee.

"(c)(1) The Attorney General or the Attorney General's designee shall call the first meeting within thirty (30) days of the effective date of this act and shall serve as chair at the first meeting.

"(2) At the first meeting, the members of the commission shall elect from its mem-

bership a chair and other officers as needed for the transaction of its business.

"(3)(A) The commission shall conduct its meetings in Pulaski County.

"(B) Meetings shall be held at least once every three (3) months, but may occur more often at the call of the chair.

"(d) If any vacancy occurs on the commission, the vacancy shall be filled by the same process as the original appointment.

"(e) The commission shall establish rules and procedures for the conduct of its business.

"(f) Members of the commission shall serve without compensation, but may receive expense reimbursement according to § 25-16-902.

"(g) A majority of the members of the commission shall constitute a quorum for transacting any business of the commission.

"(h) The Attorney General shall provide staff for the commission.

"13-4-405. Duties of the commission.

"The commission shall:

"(1) Review all criminal laws and procedure of this state and propose any needed changes or corrections to be made by law or court rules;

"(2) Prepare draft legislation concerning the needed changes or corrections to the Arkansas Criminal Code and the criminal statutes of Arkansas;

"(3) Provide a copy of the draft legislation and any recommended changes to the court rules to the House and Senate Committee on Judiciary no later than October 1, 2004; and

"(4) Recommend to the Arkansas Supreme Court no later than October 1, 2004 any needed changes in court rules.

"SECTION 2. The commission expires July 1, 2005."

Publisher's Notes. Some provisions of this chapter may be superseded by the Arkansas Rules of Criminal Procedure, which became effective January 1, 1976.

Effective Dates. Acts 1985, No. 569, § 3: Mar. 26, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that there has been a tremendous increase in the number of offenses perpetrated against children in this State, that children of very tender years have increasing difficulty remembering past events necessary for a criminal prosecution the longer the length of time between the event and the trial,

and that offenses against children are especially serious as to require, as nearly as possible, immediate removal of the offender from society. Therefore, this Act is necessary to shorten the time between the occurrence of the criminal offense and the trial and punishment of the perpetrator.

Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

Ark. L. Rev. Criminal Procedure: A Survey of Arkansas Law and the Ameri-

can Bar Association's Standards, 26 Ark. L. Rev. 169.

16-80-101. [Repealed.]

Publisher's Notes. This section, concerning method of prosecution, was repealed by Acts 2005, No. 1994, § 550. The section was derived from Rev. Stat., ch. 45,

§ 85; Crim. Code, §§ 6-8; C. & M. Dig., §§ 2854-2856, 3036; Pope's Dig., §§ 3670-3672, 3860; A.S.A. 1947, §§ 43-101 — 43-104.

16-80-102. Precedence given to criminal trials when victim under age of 14.

Notwithstanding any rule of court to the contrary and in furtherance of the purposes of the Arkansas Rules of Criminal Procedure, Rule 27.1, all courts of this state having jurisdiction of criminal offenses, except for extraordinary circumstances, shall give precedence to the trials of criminal offenses over other matters before the court, civil or criminal, when the alleged victim is a person under the age of fourteen (14) years.

History. Acts 1985, No. 569, § 1; A.S.A. 1947, § 22-159.

Publisher's Notes. Acts 1985, No. 569, § 1, is also codified as § 16-10-130.

CASE NOTES

Cited: *Thompson v. Erwin*, 310 Ark. 533, 838 S.W.2d 353 (1992).

16-80-103. Disposition of stolen property.

(a) All property obtained by theft, robbery, or burglary shall be restored to the owner, and no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his or her right to the property.

(b) Any person losing property or any valuable thing by theft, robbery, or burglary may maintain his or her action not only against the felon but against any person whatsoever in whose hands or possession the property or valuable thing may be found.

(c) When property alleged to have been stolen comes into the possession of any sheriff, constable, law enforcement officer, or other person authorized to perform the duties of the officer, he or she shall

hold the property subject to the order of the officer authorized pursuant to this section to direct the disposition thereof.

(d) Upon receiving satisfactory evidence of the ownership of the property, the judge or magistrate who shall take the examination of the person accused of stealing the property may order the property to be delivered to the owner, on his or her paying the reasonable and necessary expenses incurred in the preservation of the property, to be certified by the judge or magistrate, which order shall entitle the owner to demand and receive the property.

(e) If stolen property comes into the hands of a judge or magistrate, upon satisfactory proof of the ownership thereof, it shall be delivered to the owner, on the payment of the necessary expenses incurred in the preservation thereof, to be certified by the judge or magistrate.

(f) If the property stolen has not been delivered to the owner thereof, the court before which a conviction shall be had for stealing the property, on proof of the ownership, may order the property to be restored to the owner, on payment of the expenses incurred in the preservation thereof.

(g) If stolen property shall not be claimed by the owner within six (6) months from the time any person may have been convicted for stealing the property, the judge or magistrate authorized by the preceding provisions to order a restoration may order the property to be sold. The proceeds of the sale, after payment of the expenses of the preservation and sale of the property, shall be paid into the county treasury for the use of the county.

(h)(1) If the thing stolen is a living animal or property of a perishable nature, the judge or magistrate authorized to order a restitution may order a sale thereof, and the proceeds shall be applied in the same manner as otherwise directed in this section with respect to stolen property.

(2) In all cases of sale as specified in subdivision (h)(1) of this section a particular description of the property shall be made out in writing and filed with the judge or magistrate making the order of sale so that the owner may be enabled to identify the property if he or she shall claim the proceeds within the time allowed for making his or her claim.

History. Rev. Stat., ch. 44, div. 4, art. 6, §§ 3, 4; ch. 45, §§ 228-234; C. & M. Dig., §§ 1084, 1085, 10240a, 10240b, 3359-3365; Pope's Dig., §§ 1292, 1293, 1295, 1296, 4207-4213; A.S.A. 1947, §§ 43-2901 — 43-2909; Acts 2005, No. 1994, § 265.

Amendments. The 2005 amendment inserted "or her" and "or she" throughout the section; substituted "theft" for "larceny" in (a) and (b); inserted "law enforce-

ment officer" in (c); inserted "judge or" preceding "magistrate" twice in (d); in (e), substituted "judge or" for "justice of the peace or other" preceding the first occurrence of "magistrate" and inserted "judge or" preceding the last occurrence of "magistrate"; and substituted "judge" for "court" in (g) and (h).

Cross References. Disposition of seized things, ARCrP 15.

CASE NOTES

ANALYSIS

Insurance.
Title.

Insurance.

Insured and his assignee under automobile policy could not recover against insurer for collision of stolen car, as purchaser of stolen car does not have sole and unconditional ownership. *Southern Farmers Mut. Ins. Co. v. Motor Fin. Co.*, 215 Ark. 601, 222 S.W.2d 981 (1949).

Title.

Title to stolen property remains in its rightful owner. *Superior Iron Works & Supply Co. v. McMillan*, 235 Ark. 207, 357 S.W.2d 524 (1962).

The common law rule that title to stolen property remains in its rightful owner is now embodied in subsection (a). *Routh Wrecker Serv., Inc. v. Wins*, 312 Ark. 123, 847 S.W.2d 707 (1993).

Sections 27-50-1101 — 27-50-1103 and 27-50-1201 — 27-50-1210 have not implicitly amended the common law rule now embodied in this section since the acts are not so inconsistent that they cannot stand together; subsection (a) can be given effect where an automobile is stolen from the owner, and can be given effect when the vehicle is abandoned by the owner. *Routh Wrecker Serv., Inc. v. Wins*, 312 Ark. 123, 847 S.W.2d 707 (1993).

CHAPTER 81

ARREST

SUBCHAPTER

1. GENERAL PROVISIONS.
2. STOP AND SEARCH.
3. UNIFORM ACT ON INTRASTATE FRESH PURSUIT.
4. UNIFORM ACT ON INTERSTATE FRESH PURSUIT.

Publisher's Notes. Some provisions of this chapter may be superseded by the

Arkansas Rules of Criminal Procedure, which became effective January 1, 1976.

RESEARCH REFERENCES

Am. Jur. 5 Am. Jur. 2d, Arrest, § 3 et seq.

Ark. L. Rev. Criminal Procedure: A Survey of Arkansas Law and the American Bar Association's Standards, 26 Ark. L. Rev. 169.

C.J.S. 6A C.J.S., Arrest, § 4 et seq.

UALR L.J. Survey, Criminal Procedure, 13 UALR L.J. 349.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 16-81-101. [Repealed.]
16-81-102. Persons not subject to arrest.
16-81-103. Power of judge or magistrate to summon, examine, and issue warrant for arrest.
16-81-104. Warrant of arrest generally.

SECTION.

- 16-81-105. Execution of summons and service of process.
16-81-106. Authority to arrest.
16-81-107. Procedures of arrest.
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SECTION.

- 16-81-109. Bail.
- 16-81-110. Return on the warrant.
- 16-81-111. [Repealed.]
- 16-81-112. Escape of prisoner.
- 16-81-113. Warrantless arrest for domestic abuse.

SECTION.

- 16-81-114. Warrantless arrest for gas theft.
- 16-81-115. Certified law enforcement officers from adjoining states.

Cross References. Interpreters for arrested deaf persons, §§ 16-64-112, 16-89-105.

Effective Dates. Acts 1874, No. 2, § 3: effective on passage.

Acts 1883, No. 49, § 3: effective on passage.

Acts 1988 (3rd Ex. Sess.), No. 32, § 3: Feb. 19, 1988. Emergency clause provided: "It is hereby found and determined by the General Assembly that properly certified law enforcement officers of the U. S. Forest Service and the National Park Service are not now included in the list of federal law enforcement officers who are authorized to arrest persons who violate Arkansas laws; that these federal officers should have that authority and in order to protect the public welfare should be granted that authority as soon as possible. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1991, No. 268, § 6: Feb. 28, 1991. Emergency clause provided: "It is hereby found and determined by the Seventy-Eighth General Assembly that since the recent court decision in *Bates v. Bates*, this state has lacked adequate remedies for dealing with domestic violence and abuse; that the problem of domestic violence and abuse in our society is so complex that proper judicial remedies for victims and potential victims transcend the traditional jurisdictions of circuit and municipal court; that every potential remedy should be made available to members of households who have been subjected to abuse or are likely to be subjected to abuse such as to authorize warrantless arrests for domestic abuse. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health

and safety shall be in full force upon its passage and approval."

Acts 2005, No. 26, § 2: Feb. 1, 2005. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that crime is a threat to the safety to the citizens of the State of Arkansas; that additional certified law enforcement officers can reduce the threat of crime; and that this act is immediately necessary because it will avoid delay in increasing the number of law enforcement officers that can arrest offenders of the laws of the State of Arkansas. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2005, No. 272, § 2: Feb. 24, 2005. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that there is currently no statute that authorizes certified law enforcement officers from border cities to assist Arkansas law enforcement officers, and a statute is needed for the more efficient enforcement of Arkansas law. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

RESEARCH REFERENCES

ALR. Sufficiency of showing of reasonable belief of danger to officers or others excusing compliance with 'knock and announce' requirement — state criminal cases. 17 ALR 4th 301.

Lawfulness of warrantless search of purse or wallet of person arrested or suspected of crime. 29 ALR 4th 771.

Arrest without warrant by identified police officer outside of jurisdiction, when not in fresh pursuit. 34 ALR 4th 328.

Liability for false arrest or imprisonment under warrant as affected by mistake as to identity of person arrested. 39 ALR 4th 705.

Validity of arrest made in reliance upon uncorrected or outdated warrant list or similar police records. 45 ALR 4th 550.

Ark. L. Rev. Torts — Unprivileged Ar-

rest as a Basis for False Imprisonment Action, 3 Ark. L. Rev. 485.

The Obstruction of Justice by Interference with a Law Enforcement Officer's Performance of Duty, 6 Ark. L. Rev. 46.

Criminal law — Arrest — Presence of Officer as Prerequisite to Arrest for Misdemeanor, 15 Ark. L. Rev. 210.

The Federal Standard: The New State Law of Search and Seizure? 19 Ark. L. Rev. 329.

Search of the Person Incident to a Lawful Arrest, 28 Ark L. Rev. 79.

Arrest, Citation and Summons — The Supreme Court Takes a Giant Step Forward, 30 Ark. L. Rev. 137.

UALR L.J. Note, Arrest without a warrant — a man's home is his castle, 4 UALR L.J. 95.

16-81-101. [Repealed.]

Publisher's Notes. This section, concerning persons subject to arrest, was repealed by Acts 2005, No. 1994, § 551.

The section was derived from Crim. Code, § 5; C. & M. Dig., § 2853; Pope's Dig., § 3669; A.S.A. 1947, § 43-401.

16-81-102. Persons not subject to arrest.

(a)(1) The members of the Senate and House of Representatives and the clerks, sergeants-at-arms, and doorkeepers of each branch of the General Assembly shall be privileged from arrest during the session of the General Assembly and for fifteen (15) days before the commencement and after the termination of each session.

(2) If any person shall arrest any of the persons named in this subsection during the time they are privileged therefrom, the person shall forfeit and pay the sum of one hundred dollars (\$100), with costs, to be recovered by action in the name and for the use of the injured party.

(b) All persons qualified to vote for representatives in the General Assembly shall be privileged from arrest during their attendance at any election and while on their way going to and returning from the election.

(c) No person shall be arrested while doing militia duty under the order of his commanding officer or while going to or returning from the place of duty or parade.

(d) No person shall be arrested in the Senate chamber or House of Representatives during their sitting, or in any court of justice during the sitting of the court.

(e) Nothing contained in this section shall be so construed as to extend to cases of treason, felony, or breach of the peace or to privilege

any person named from being served at any time or place specified in this section with a summons or notice to appear.

(f) If any person is arrested contrary to the provisions of this section, the person shall be discharged on a writ of habeas corpus by any court or officer having authority to issue the writ at the cost of the party procuring the arrest.

History. Rev. Stat., ch. 10, §§ 1, 3-6, 8, 9; C. & M. Dig., §§ 429, 431-434, 436, 437; Pope's Dig., §§ 466, 468-471, 473, 474; A.S.A. 1947, §§ 43-301 — 43-307.

Cross References. Certain actions, witnesses privileged from arrest, § 16-43-102.

Criminal prosecutions, witnesses from without the state privileged from arrest, § 16-43-404.

Electors, except for treason, felony, and

breach of the peace, privileged from arrest, Ark. Const., Art. 3, § 4.

Exemption of members of General Assembly from arrest, Ark. Const., Art. 5, § 15.

Prisoner from other state immune from arrest or process while being transported or held as witness, § 16-43-308.

Privilege of volunteer and militia forces from arrest, Ark. Const., Art. 11, § 3.

CASE NOTES

ANALYSIS

Legislators.

Waiver of exemption.

Legislators.

A member of the legislature, while in attendance at a session of the General Assembly, can be served with a summons to appear after the adjournment of the

legislature. *Doyle-Kidd Dry Goods Co. v. Munn*, 151 Ark. 629, 238 S.W. 40 (1922).

Waiver of Exemption.

The right of a militiaman to be exempt from arrest may be waived by him. *Reed v. State*, 103 Ark. 391, 147 S.W. 76 (1912).

Cited: *Jones v. Adkins*, 176 Ark. 167, 2 S.W.2d 9 (1928).

16-81-103. Power of judge or magistrate to summon, examine, and issue warrant for arrest.

When a judge or magistrate is satisfied that a felony has been committed, he or she shall have power to summon before him or her any persons he or she may think proper and examine them on oath concerning it to enable him or her to ascertain the offender and to issue a warrant for his or her arrest.

History. Crim. Code, § 29; C. & M. Dig., § 2900; Pope's Dig., § 3716; A.S.A. 1947, § 43-410; Acts 2005, No. 1994, § 266.

Amendments. The 2005 amendment inserted "judge or" and made gender neutral changes.

16-81-104. Warrant of arrest generally.

(a)(1)(A) A warrant of arrest may be issued by any circuit judge, district judge, or city judge or magistrate.

(B) A warrant of arrest may be executed by any law enforcement officer.

(2) It shall be the duty of a judge or magistrate to issue a warrant for the arrest of a person charged with the commission of a public offense when, from his or her personal knowledge or from information

given him or her on oath, the judge or magistrate shall be satisfied that there are reasonable grounds for believing the charge.

(3) The prosecuting attorney of every district in this state shall have authority, whenever he or she believes any person has committed a crime in any county in the district for which he or she is elected, to file before any circuit judge, district judge, or city judge or magistrate within the county in which he or she believes the crime has been committed a written information, under oath, charging the person in due form of law with the commission of the crime, whereupon the justice shall issue his or her warrant for the arrest of the offender and have the offender brought before him or her to be dealt with according to law.

(b) A warrant of arrest, in general terms, shall name or describe the offense charged to have been committed and the county in which it was committed. The warrant shall command the officer to whom it is directed to arrest the person named therein as the offender and bring him or her before some judge or magistrate of the county in which the offense was committed, to be dealt with according to law. It may be substantially in the following form, varying the terms to suit the case:

“The State of Arkansas.

To any law enforcement officer of the State of Arkansas:

It appearing that there are reasonable grounds for believing that A. B. has committed the offense of larceny in the County of Pulaski, you are therefor commanded, forthwith, to arrest A. B., and bring him before some judge or magistrate of Pulaski County, to be dealt with according to law.

Given under my hand the _____ day of _____, 20____ .

C.D.

Judge or Magistrate,

Summon as witnesses E. F. and J. K.”

History. Crim. Code, §§ 23, 24, 28; Acts 1883, No. 49, § 2, p. 72; C. & M. Dig., §§ 2894, 2895, 2899, 8320; Pope's Dig., §§ 3710, 3711, 3715, 10897; A.S.A. 1947, §§ 43-406 — 43-409; Acts 2005, No. 1994, § 266.

Publisher's Notes. “This code,” referred to in this section, means the Code of Practice in Criminal Cases of 1869. See parallel reference tables in the tables volume.

Amendments. The 2005 amendment rewrote (a)(1); inserted “judge or” in (a)(2)

and (b); substituted “circuit, district, or city judge or magistrate” for “justice of the peace” in (a)(3); in the sample warrant form, substituted “law enforcement officer” for “Sheriff, Constable, Coroner, Jailer, Marshal, or Policeman” and “Judge or Magistrate” for “Justice of the Peace for Pulaski County” and made gender neutral changes.

Cross References. Basis for issuance, ARCrP 7.1.

Form of warrant, ARCrP 7.2.

CASE NOTES

ANALYSIS

Constitutionality.
Purpose.

Affidavit.
Approval by judge.
Defects.
Description of offense.

Issuance by clerk.
 Judicial immunity upheld.
 Offense against united states.

Constitutionality.

Although this section prescribes a procedure for the issuance of warrants that includes the presentation of the information to a neutral and detached magistrate, it appears to require the magistrate to issue the warrant upon such presentation. If this reading is correct, this section would impermissibly vest power to make probable-cause determinations in the hands of the prosecutor. *Fairchild v. Lockhart*, 675 F. Supp. 469 (E.D. Ark. 1987), *aff'd*, 857 F.2d 1204 (8th Cir. 1988), cert. denied, 488 U.S. 1051, 109 S. Ct. 884, 102 L. Ed. 2d 1007 (1989).

Purpose.

The only purpose of an affidavit and arrest warrant is to have an accused arrested and brought before the justice, or other officer issuing the warrant, so that the accused may be dealt with according to law. *Gomez v. State*, 305 Ark. 496, 809 S.W.2d 809 (1991).

Affidavit.

Where the affidavit served its purpose, it was not necessary to consider whether the affidavit was defective for failing to state the date the alleged offense took place. *Gomez v. State*, 305 Ark. 496, 809 S.W.2d 809 (1991).

Approval by Judge.

The appearance of the traffic judge's initials on the corner of a warrant of arrest would not cause court to take judicial notice that judge must have approved the issuance of the warrant by the clerk. *Webb v. State*, 269 Ark. 415, 601 S.W.2d 848 (1980).

Defects.

A warrant commanding an officer to arrest on a charge of felony without designating the species of felony is not void

and the officer cannot legally refuse to arrest the accused and will be liable to indictment if he permits him to escape by negligence. *Martin v. State*, 32 Ark. 124 (1877).

A defective warrant is immaterial after arrest. *Cox v. City of Jonesboro*, 112 Ark. 96, 164 S.W. 767 (1914); *Dudney v. State*, 136 Ark. 453, 206 S.W. 898 (1918).

An illegal arrest is not grounds for dismissal of criminal charges. *State v. Fore*, 46 Ark. App. 27, 876 S.W.2d 278 (1994).

Description of Offense.

Description of offense may be in general terms. *Tucker v. State*, 86 Ark. 436, 111 S.W. 275 (1908); *Lismore v. State*, 94 Ark. 207, 126 S.W. 853 (1910); *State v. Brown*, 131 Ark. 127, 198 S.W. 877 (1917).

Issuance by Clerk.

Arrest warrant for contempt of court which was issued by court clerk without authorization of judge and without accompanying affidavit or proof that an information was issued and which was not executed for over two years after its issuance was invalid as being both defective and "stale." *Webb v. State*, 269 Ark. 415, 601 S.W.2d 848 (1980).

Judicial Immunity Upheld.

Because Arkansas law authorizes municipal judges to issue arrest warrants, where municipal judge issued warrant to enforce a circuit court judgment, judge acted, at most, in excess of jurisdiction and not in the clear absence of jurisdiction. *Duty v. City of Springdale*, 42 F.3d 460 (8th Cir. 1994).

Offense Against United States.

Justice of the peace may issue a warrant for and bind over one charged with perjury against the laws of the United States. *McIntosh v. Bullard, Earnheart & Magness*, 95 Ark. 227, 129 S.W. 85 (1910).

Cited: *Pursley v. State*, 302 Ark. 471, 791 S.W.2d 359 (1990).

16-81-105. Execution of summons and service of process.

Any law enforcement officer to whom any criminal summons or warrant of arrest is directed may serve or execute it in any county in the state.

History. Init. Meas. 1936, No. 3, § 19, Acts 1937, p. 1384; Pope's Dig., § 3865; A.S.A. 1947, § 43-411; Acts 2005, No. 1994, § 248.

Amendments. The 2005 amendment substituted "law enforcement" for "peace."

CASE NOTES

ANALYSIS

Construction.
Territorial jurisdiction.
Warrantless arrest.

Construction.

There are only four instances where the General Assembly has delegated the authority for law enforcement officers to make an arrest outside of their jurisdictions: (1) "fresh pursuit" (§ 16-81-301); (2) when the police officer has a warrant for arrest (§ 16-81-105); (3) when a local law enforcement agency requests an outside officer to come into the local jurisdiction and the outside officer is from an agency that has a written policy regulating its officers when they act outside their jurisdiction (§ 16-81-106(b)(3) and (4)); and (4) when a county sheriff requests that a peace officer from a contiguous county come into that sheriff's county and investigate and make arrests for violations of drug laws (§ 5-64-705). *Henderson v. State*, 329 Ark. 526, 953 S.W.2d 26 (1997).

Territorial Jurisdiction.

The traditional concept of territorial ju-

risdiction for peace officers is a sound one since a local community is best served by the requirement that local officers familiar with local neighborhoods make arrests in the community. *Perry v. State*, 303 Ark. 100, 794 S.W.2d 141 (1990).

Warrantless Arrest.

Where the defendant was incarcerated and charged with robbery and the evidence was of such a substantial nature that the county officers had reasonable grounds or probable cause for the arrest and detention of defendant on the robbery charge, the warrantless arrest by the officer outside his county was a lawful arrest and restraint. *Williams v. State*, 259 Ark. 549, 534 S.W.2d 760 (1976).

Where two officers from one county were accompanied by a police officer of the county in which the arrest was made, at the time of the arrest, no warrant was needed. *Logan v. State*, 264 Ark. 920, 576 S.W.2d 203 (1979).

Cited: *Davis v. Dahmm*, 763 F. Supp. 1010 (W.D. Ark. 1991); *Brown v. State*, 38 Ark. App. 18, 827 S.W.2d 174 (1992).

16-81-106. Authority to arrest.

(a) An arrest may be made by a certified law enforcement officer or by a private person.

(b) A certified law enforcement officer may make an arrest:

(1) In obedience to a warrant of arrest delivered to him or her; and
(2)(A) Without a warrant, where a public offense is committed in his or her presence or where he or she has reasonable grounds for believing that the person arrested has committed a felony.

(B) In addition to any other warrantless arrest authority granted by law or court rule, a certified law enforcement officer may arrest a person for a misdemeanor without a warrant if the officer has probable cause to believe that the person has committed battery upon another person, the officer finds evidence of bodily harm, and the officer reasonably believes that there is danger of violence unless the person alleged to have committed the battery is arrested without delay.

(c)(1) A certified law enforcement officer who is outside his or her jurisdiction may arrest without warrant a person who commits an offense within the officer's presence or view if the offense is a felony or a misdemeanor.

(2)(A) A certified law enforcement officer making an arrest under subdivision (c)(1) of this section shall notify the law enforcement agency having jurisdiction where the arrest was made as soon as practicable after make the arrest.

(B) The law enforcement agency shall then take custody of the person committing the offense and take the person before a judge or magistrate.

(3) Statewide arrest powers for certified law enforcement officers will be in effect only when the officer is working outside his or her jurisdiction at the request of or with the permission of the municipal or county law enforcement agency having jurisdiction in the locale where the officer is assisting or working by request.

(4) Any law enforcement agency exercising statewide arrest powers under this section must have a written policy on file regulating the actions of its employees relevant to law enforcement activities outside its jurisdiction.

(d) A private person may make an arrest where he or she has reasonable grounds for believing that the person arrested has committed a felony.

(e) A magistrate or any judge may orally order a certified law enforcement officer or private person to arrest anyone committing a public offense in the magistrate's or judge's presence, which order shall authorize the arrest.

(f) For purposes of this section, the term "certified law enforcement officer" includes a full-time wildlife officer of the Arkansas State Game and Fish Commission so long as the officer shall not exercise his or her authority to the extent that any federal funds would be jeopardized.

(g) The following persons employed as full-time law enforcement officers by the federal, state, county, or municipal government, who are empowered to effect an arrest with or without warrant for violations of the United States Code and who are authorized to carry firearms in the performance of their duties, shall be empowered to act as officers for the arrest of offenders against the laws of this state and shall enjoy the same immunity, if any, to the same extent and under the same circumstances as certified state law enforcement officers:

- (1) Federal Bureau of Investigation special agents;
- (2) United States Secret Service special agents;
- (3) United States Citizenship and Immigration Services special agents, investigators, and patrol officers;
- (4) United States Marshals Service deputies;
- (5) Drug Enforcement Administration special agents;
- (6) United States postal inspectors;
- (7) United States Customs and Border Protection special agents, inspectors, and patrol officers;
- (8) United States General Services Administration special agents;
- (9) United States Department of Agriculture special agents;
- (10) Bureau of Alcohol, Tobacco, Firearms and Explosives special agents;

- (11) Internal Revenue Service special agents and inspectors;
 - (12) Certified law enforcement officers of the United States Department of the Interior, National Park Service, and the United States Fish and Wildlife Service;
 - (13) Members of federal, state, county, municipal, and prosecuting attorneys' drug task forces; and
 - (14) Certified law enforcement officers of the United States Department of Agriculture, Forest Service.
- (h) Pursuant to Article 2.124 of the Texas Code of Criminal Procedure, any certified law enforcement officer of the State of Arkansas or law enforcement officer specified in subsection (g) of this section shall be authorized to act as a law enforcement officer in the State of Texas with the same power, duties, and immunities of a peace officer of the State of Texas who is acting in the discharge of an official duty:

(1) During a time in which:

(A)(i) The law enforcement officer from the State of Arkansas is transporting an inmate or criminal defendant from a county in Arkansas that is on the border of Texas to a hospital or other medical facility in a county in Texas that is on the border between the two (2) states.

(ii) Transportation to such a facility shall be for purposes including, but not limited to, evidentiary testing of that inmate or defendant as is authorized pursuant to laws of the State of Arkansas or for medical treatment; or

(B) The law enforcement officer from the State of Arkansas is returning the inmate or defendant from the hospital or facility in Texas to an adjoining county in Arkansas; and

(2) To the extent necessary to:

(A) Maintain custody of the inmate or defendant while transporting the inmate or defendant; or

(B) Retain custody of the inmate or defendant if the inmate or defendant escapes while being transported.

(i) A certified law enforcement officer trained pursuant to a memorandum of understanding between the State of Arkansas and the United States Department of Justice or the United States Department of Homeland Security is authorized to make an arrest in order to enforce federal immigration laws.

History. Crim. Code, §§ 32-35; C. & M. Dig., §§ 2903-2906; Pope's Dig., §§ 3719-3722; Acts 1983, No. 848, § 1; A.S.A. 1947, §§ 43-402 — 43-405; Acts 1987, No. 496, § 1; 1988 (3rd Ex. Sess.), No. 32, § 1; 1989, No. 715, § 1; 1989, No. 846, § 1; 1993, No. 362, § 1; 1993, No. 436, § 1; 1995, No. 719, § 1; 2005, No. 26, § 1; 2005, No. 907, § 4; 2005, No. 1994, § 267.

A.C.R.C. Notes. The title of Acts 1988 (3rd Ex. Sess.), No. 32, purports to amend

§ 16-81-106 by allowing National Park Service officers and employees to arrest persons. Section 1 of the act grants arrest powers to officers of the Department of Interior, National Park Service. The emergency clause, however, states that, in addition to the National Park Service, law enforcement officers of the U.S. Forest Service should be given arrest powers. The U.S. Forest Service is under the Department of Agriculture.

This section, as amended by Acts 1989, No. 715, was repealed by identical Acts 1993, Nos. 362 and 436, § 2.

Amendments. The 2005 amendment by No. 26 inserted "and the United States Fish and Wildlife Service" in (g)(12); and added (g)(14).

The 2005 amendment by No. 907 added (i).

The 2005 amendment by No. 1994 inserted "or her" and "or she" throughout this section; and inserted "judge or" in (c)(2)(B).

Cross References. Failure to meet qualifications for law enforcement officers, § 12-9-108.

RESEARCH REFERENCES

Ark. L. Rev. Killenbeck, Nothing That We Can Do? Or, Much Ado About Nothing? Some Thoughts on Bates v. Bates, Equity, and Domestic Abuse in Arkansas, 43 Ark. L. Rev. 747.

Killenbeck, And Then They Did ... ? Abusing Equity in the Name of Justice, 44 Ark. L. Rev. 235.

CASE NOTES

ANALYSIS

Construction.
Authority to detain.
Certification.
Illegal arrest.
Outside jurisdiction.
Statewide power.
Territorial jurisdiction.

Construction.

Where Acts 1989, No. 846 covered the entire subject matter of Acts 1989, No. 715, the General Assembly intended No. 846 as a substitute for No. 715, which repealed No. 715 amending this section by extending to wild life officers the same powers as other law enforcement officers. *Uilkie v. State*, 309 Ark. 48, 827 S.W.2d 131 (1992).

There are only four instances where the General Assembly has delegated the authority for law enforcement officers to make an arrest outside of their jurisdictions: (1) "fresh pursuit" (§ 16-81-301); (2) when the police officer has a warrant for arrest (§ 16-81-105); (3) when a local law enforcement agency requests an outside officer to come into the local jurisdiction and the outside officer is from an agency that has a written policy regulating its officers when they act outside their jurisdiction (§ 16-81-106(3) and (4)); and (4) when a county sheriff requests that a peace officer from a contiguous county come into that sheriff's county and investigate and make arrests for violations of drug laws (§ 5-64-705). *Henderson v. State*, 329 Ark. 526, 953 S.W.2d 26 (1997).

Authority to Detain.

Arkansas Rule of Criminal Procedure 3.1 provides that a law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing a felony or misdemeanor involving danger or forcible injury to persons or damage to the identification of the person, or to determine the lawfulness of his conduct. *King v. State*, 42 Ark. App. 97, 854 S.W.2d 362 (1993).

Certification.

This section and § 12-9-108 are repugnant in that this section provides that only certified law enforcement officers have the authority to make arrests, while § 12-9-108 provides that it does not matter whether officers are certified in order to make a valid arrest; however, that limited difference did not repeal the authority of law enforcement officers to make arrests, and a law officer who is vested with the authority to make arrests can issue citations. *McDaniel v. State*, 309 Ark. 20, 826 S.W.2d 286 (1992).

Illegal Arrest.

An illegal arrest is not grounds for dismissal of criminal charges. *State v. Fore*, 46 Ark. App. 27, 876 S.W.2d 278 (1994).

Outside Jurisdiction.

A local police officer, acting without a warrant outside the territorial limits of the jurisdiction under which he holds office, is without official power to apprehend

an offender unless he is authorized to do so by statute, and evidence obtained as a result of an unlawful detention or illegal arrest is subject to the exclusionary rule and should be suppressed. *Perry v. State*, 303 Ark. 100, 794 S.W.2d 141 (1990).

Where officer went to the location reported to him and observed truck being driven in a hazardous manner, stopped the truck, observed that defendant was drunk, and arrested him, the misdemeanor was committed in the officer's presence within the meaning of (c). *Menard v. City of Carlisle*, 309 Ark. 522, 834 S.W.2d 632 (1992).

Where police officer initially noticed defendant's erratic driving while both the officer and the defendant were within the city limits, but where the officer waited for an additional period of observation before stopping and arresting the defendant rather than taking a chance of having the case dismissed, the officer had the authority to either stop, or to stop and arrest, the defendant before he left the officer's jurisdiction, and the officer was within the bounds of his authority when he followed defendant outside his jurisdiction and subsequently made the stop and arrest. *King v. State*, 42 Ark. App. 97, 854 S.W.2d 362 (1993).

Police officer from another jurisdiction

had authority to arrest defendant as the latter was seen leaving a the scene of an attempted robbery because the local jurisdiction had asked the officer to assist and the foreign jurisdiction had a written policy on how to render assistance outside the foreign officer's jurisdiction. *Martinez v. State*, 352 Ark. 135, 98 S.W.3d 827 (2003).

Statewide Power.

Fact that city resolution authorizing officers to go into unincorporated parts of county did not provide for statewide arrest authority did not constitute noncompliance with this section since section does not require that the local government must make its officers travel statewide; there is no language in this section that would prohibit limiting the officer's official travel to a particular area of the state. *Menard v. City of Carlisle*, 309 Ark. 522, 834 S.W.2d 632 (1992).

Territorial Jurisdiction.

The traditional concept of territorial jurisdiction for peace officers is a sound one since a local community is best served by the requirement that local officers familiar with local neighborhoods make arrests in the community. *Perry v. State*, 303 Ark. 100, 794 S.W.2d 141 (1990).

Cited: *Perry v. State*, 303 Ark. 100, 794 S.W.2d 141 (1990).

16-81-107. Procedures of arrest.

(a) An arrest is made by placing the person of the defendant in restraint or by his or her submitting to the custody of the person making the arrest.

(b) No unnecessary force or violence shall be used in making the arrest.

(c) To make an arrest, a law enforcement officer may break open the door of a house in which the defendant may be after having demanded admittance and explained the purpose for which admittance is desired.

(d) A law enforcement officer making an arrest may summon orally as many persons as he or she deems necessary to aid him or her in making the arrest, and all persons failing without reasonable excuse to obey the summons shall be guilty of Class C misdemeanors.

(e) The person making the arrest shall:

(1) Inform the person about to be arrested of the intention to arrest him or her and the offense for which he or she is to be arrested; and

(2) If acting under a warrant of arrest, give information of the warrant and show the warrant if required.

(f) The law enforcement officer making an arrest in obedience to a warrant shall proceed with the defendant as directed by the warrant.

History. Crim. Code, §§ 36-40, 42; C. & M. Dig., §§ 2907-2912; Pope's Dig., §§ 3723-3728; A.S.A. 1947, §§ 43-412 — 43-414, 43-415 — 43-417; Acts 2005, No. 1994, § 412.

Amendments. The 2005 amendment substituted "a law enforcement" for "an" in (c) and (d); inserted "or her" in (d) and twice in (e); in (d), inserted "Class C" and

deleted "and punished by fine and imprisonment, or either" at the end; inserted "or she" in (e); and inserted "law enforcement" in (f).

Cross References. Procedures on Arrest, ARCrP 4.4.

Refusing to assist law enforcement officer, § 5-54-109.

Resistance to authority, § 12-11-104.

CASE NOTES

ANALYSIS

Purpose.

Applicability.

Duty to inform.

Failure to aid officer.

Manner of making arrest.

Use of force.

Purpose.

This section is designed for the protection of the citizen, who may not be deprived of the liberty and taken into custody without being advised of the reasons for that action. *Minton v. State*, 198 Ark. 875, 131 S.W.2d 948 (1939).

Applicability.

This section has no application when the offense is committed in the presence of the officer, and the offender knows the officer has seen him commit the offense. *Minton v. State*, 198 Ark. 875, 131 S.W.2d 948 (1939).

Where the trouble resulted from defendant's resistance to and interference with an officer in the discharge of his duty, this statute has no application if the offense is committed in the presence of the officer and the officer would have no duty to inform defendant of the reason for his arrest. *Bookout v. Hanshaw*, 235 Ark. 924, 363 S.W.2d 125 (1962).

Duty to Inform.

The attempt of an officer to arrest one without informing him that he held a warrant and of his intention to arrest him does not justify the latter in killing the officer where he knew that he had the warrant and that his purpose was to arrest him. *Appleton v. State*, 61 Ark. 590, 33 S.W. 1066 (1896).

Where there was evidence that defendant charged with murder killed deceased while attempting to arrest him for offense committed in his presence, instruction ad-

vising jury that "person making the arrest shall inform the person about to be arrested of the intent to arrest him, the offense charged against him for which he is to be arrested" was reversible error. *Minton v. State*, 198 Ark. 875, 131 S.W.2d 948 (1939).

Where defendant had testified that he presumed that the arresting officer was in fact an officer of the law, the trial court did not err in refusing to instruct the jury that the officer making the arrest must inform person of the officer's intention to arrest him and the offense for which he is being arrested, in view of fact that defendant's objection to the court's failure to give the instruction was based solely on the ground that the officer's official capacity was not made known to defendant. *Dillard v. State*, 260 Ark. 743, 543 S.W.2d 925 (1976).

Failure to Aid Officer.

It is a good defense to a prosecution for failure to obey summons to aid an officer in making an arrest that defendant was sick and therefore unable to do so. *Town of Greenwood v. Smothers*, 103 Ark. 158, 146 S.W. 109 (1912); *Allen v. State*, 117 Ark. 432, 174 S.W. 1179 (1915).

Manner of Making Arrest.

The word "arrest" did not have to be used to constitute a lawful arrest, rather it was the actual restrain or consent to restraint which constituted the arrest. *McDonald v. State*, 253 Ark. 812, 491 S.W.2d 36 (1973).

Although ARCrP 4.4 requires that the officer inform the arrested person that he is under arrest, formal words are not essential to an arrest. *Williams v. State*, 278 Ark. 9, 642 S.W.2d 887 (1982).

The officers were not required to make an arrest when they first had probable cause to do so. *Williams v. State*, 278 Ark. 9, 642 S.W.2d 887 (1982).

Use of Force.

Evidence insufficient to allow officer to plead self-defense. *Johnson v. State*, 100 Ark. 139, 139 S.W. 1117 (1911).

Evidence sufficient to show that force used was necessary because plaintiffs were resisting arrest. *Pritchard v. Downie*, 216 F. Supp. 621 (E.D. Ark. 1963), *aff'd*, 326 F.2d 323 (8th Cir. 1964).

Cited: *Martin v. State*, 114 Ark. 230, 169 S.W. 776 (1914); *Pritchard v. Downie*,

216 F. Supp. 621 (E.D. Ark. 1963); *Akins v. State*, 253 Ark. 273, 485 S.W.2d 535 (1972); *Douglas v. Buder*, 412 U.S. 430, 93 S. Ct. 2199, 37 L. Ed. 2d 52 (1973); *United States v. Price*, 441 F. Supp. 814 (E.D. Ark. 1977); *Logan v. State*, 264 Ark. 920, 576 S.W.2d 203 (1979); *Ginter v. Stallcup*, 641 F. Supp. 939 (E.D. Ark. 1986); *Pursley v. State*, 302 Ark. 471, 791 S.W.2d 359 (1990).

16-81-108. Arrest on certain private property permitted.

State and local police are authorized to enter upon the parking areas of private business establishments and to discover, investigate, and effect the arrest of persons thereon violating any state or local law to the same extent as if the person or persons were upon the public streets or highways.

History. Acts 1969, No. 107, § 1; A.S.A. 1947, § 43-414.1.

CASE NOTES**Violation of Traffic Laws.**

Inasmuch as a shopping center parking lot was not a highway, a defendant, whose car collided with another vehicle as defendant was pulling out of a parking space,

could not be charged with the violation of failure to yield right-of-way. *Hartson v. City of Pine Bluff*, 270 Ark. 748, 606 S.W.2d 149 (1980).

16-81-109. Bail.

(a)(1) When any sheriff or other law enforcement officer makes an arrest, he or she is authorized to take and to approve bail in the manner provided by law wherever he or she makes the arrest.

(2) If the offense charged is a misdemeanor, the person arrested may immediately give bail for appearing on a day to be named in the bail bond before the judge or magistrate who issued the warrant or before the court having jurisdiction to try the offense. The sheriff or other officer making the arrest may be authorized by the judge or magistrate issuing the warrant to take the bail by an endorsement made on the warrant to that effect.

(b)(1) If the defendant gives bail for his or her appearance before the judge or magistrate for an examination of the charge, as provided in subsection (a) of this section, the sheriff or officer taking the bail shall fix the day of the defendant's appearance.

(2) A deviation from the provisions of subdivision (b)(1) of this section shall not, however, render the bail bond invalid.

History. Crim. Code, §§ 25-27; Acts §§ 2896-2898; Init. Meas. 1936, No. 3, 1871, No. 49, § 1 [25]; C. & M. Dig., § 19, Acts 1937, p. 1384; Pope's Dig.,

§§ 3712-3714, 3865; A.S.A. 1947, §§ 43-411, 43-418 — 43-420; Acts 2005, No. 1994, § 268.

Amendments. The 2005 amendment, in (a)(1), inserted “sheriff or other law enforcement” and “or she”; inserted “judge or” in (a)(2) and (b)(1); substituted “judge or magistrate” for “justice” in (a)(2); and, in (b)(1), inserted “or her” and “sheriff or” and deleted “which shall not exceed five (5) days from the day of arrest, unless the

arrest is made in a different county from that in which the offense was committed, in which case there may be one (1) day added for every twenty (20) miles of distance from the place of arrest to the county in which the offense is charged to have been committed” from the end.

Cross References. Bail generally, § 16-84-101 et seq.

Imprisonment for debt, Ark. Const., Art. 2, § 16.

CASE NOTES

ANALYSIS

Affidavits.

Bail bond in replevin.

Affidavits.

Affidavits to hold to bail must be strictly construed. *Robinson v. Holt*, 20 F. Cas. 1016 (C.C.D. Ark. 1840).

Bail Bond in Replevin.

In the case of a bail bond in replevin, recovery could not be had against the sureties, in view of this section, until a capias ad satisfaciendum issued with a return thereon of non est inventus. *Daniels v. Wagner*, 156 Ark. 198, 245 S.W. 487 (1922).

16-81-110. Return on the warrant.

(a)(1) The sheriff or officer who has executed a warrant of arrest shall make a written return on the warrant of the time and manner of executing it and deliver the warrant to the judge or magistrate before whom the defendant is brought.

(2) If bail is given as provided in § 16-81-109(a)(2), the officer shall deliver the warrant and bail bond to the judge or magistrate before whom, or to the clerk of the court in which, the defendant is bound by the bail bond to appear.

(b) If the arrest is made in a different county from that in which the offense is charged to have been committed and bail is given, the sheriff or officer may transmit the warrant and bail bond by mail to the person to whom by subsection (a) of this section he or she is required to deliver them.

History. Crim. Code, §§ 30, 31; C. & M. Dig., §§ 2901, 2902; Pope's Dig., §§ 3717, 3718; A.S.A. 1947, §§ 43-421, 43-422; Acts 2005, No. 1994, § 268.

Amendments. The 2005 amendment inserted “sheriff or” and “judge or”

throughout this section; and inserted “or she” in (b).

Cross References. Return of warrant and summons, execution after return, ARCrP 7.3.

16-81-111. [Repealed.]

Publisher's Notes. This section, concerning transportation of prisoners, was repealed by Acts 2005, No. 1994, § 552. The section was derived from Rev. Stat.,

ch. 45, §§ 237-239; C. & M. Dig., §§ 3366-3368; Pope's Dig., §§ 4214-4216; A.S.A. 1947, §§ 43-423 — 43-425.

16-81-112. Escape of prisoner.

(a) If the defendant escapes or is rescued after an arrest, the person in whose custody he or she was may immediately pursue and recapture him or her in any part of the state.

(b)(1) If any person charged with or convicted of a felony within this state breaks prison, escapes, flees from justice, or absconds or secretes himself or herself, it shall be lawful for the Governor, if he or she deems it necessary, to offer a reward not to exceed the sum of one hundred thousand dollars (\$100,000) for apprehending and delivering the person into the custody of an officer as the governor may direct.

(2) Any person apprehending and delivering the escapee to the proper officer and producing to the Governor the receipt of the officer for the body of the escapee shall be entitled to the reward offered by the Governor, and the Governor shall certify the amount of the reward to the Auditor of State, who shall issue his or her warrant on the State Treasury for the reward, to be paid out of any money appropriated for the contingent expenses of the executive department.

History. Rev. Stat., ch. 67, §§ 27, 28; Crim. Code, § 41; Acts 1874, No. 2, § 1, p. 39; C. & M. Dig., §§ 2916, 4897, 4898; Pope's Dig., §§ 3732, 6108, 6109; A.S.A. 1947, §§ 43-426 — 43-428; Acts 2005, No. 1994, § 489.

in (b)(1), deleted "treason, murder, rape, robbery, burglary, arson, larceny, perjury, counterfeiting, or any other" following "convicted of" and substituted "one hundred thousand dollars (\$100,000)" for "one thousand dollars."

Amendments. The 2005 amendment,

CASE NOTES

Cited: Blevins v. State, 31 Ark. 53 (1876).

16-81-113. Warrantless arrest for domestic abuse.

(a)(1) When a law enforcement officer has probable cause to believe a person has committed acts which constitute a crime under the laws of this state and which constitute domestic abuse as defined in subdivision (b)(1) of this section against a family or household member, the officer may arrest the person without a warrant if the law enforcement officer has probable cause to believe the person has committed those acts within the preceding four (4) hours, or within the preceding twelve (12) hours for cases involving physical injury as defined in § 5-1-102(14), even if the incident did not take place in the presence of the law enforcement officer.

(2) The arrest of the person shall be considered the preferred action by the law enforcement officer when evidence indicates that domestic abuse has occurred in addition to a violation of the Arkansas Criminal Code, § 5-1-101 et seq.

(3) Any law enforcement officer acting in good faith and exercising due care in making an arrest for domestic abuse shall have immunity from civil liability.

(b) As used in this section:

(1) "Domestic abuse" means:

(A) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault between family or household members; or

(B) Any sexual conduct between family or household members, whether minors or adults, which constitutes a crime under the laws of this state; and

(2) "Family or household member" means spouses, former spouses, parents and children, persons related by blood within the fourth degree of consanguinity, any child residing in the household, persons who have resided or cohabited together presently or in the past, persons who have or have had a child in common, and persons who have been in a dating relationship together presently or in the past; and

(3)(A) "Dating relationship" means a romantic or intimate social relationship between two (2) individuals which shall be determined by examining the following factors:

(i) The length of the relationship;

(ii) The type of the relationship; and

(iii) The frequency of interaction between the two (2) individuals involved in the relationship.

(B) "Dating relationship" shall not include a casual relationship or ordinary fraternization in a business or social context between two (2) individuals.

(c)(1) Any person arrested under the provisions of this section shall be taken before a judicial officer without unnecessary delay.

(2) The judicial officer shall conduct a pretrial release inquiry of the person.

(d) The inquiry should take the form of an assessment of factors relevant to the release decision such as:

(1) The person's employment status, history, and financial condition;

(2) The nature and extent of his or her family relationships;

(3) His or her past and present residence;

(4) His or her character and reputation;

(5) Persons who agree to assist him or her in attending court at the proper times;

(6) The nature of the charge and any mitigating or aggravating factors that may bear on the likelihood of conviction and the possible penalty;

(7) The person's prior criminal record, if any, and if he or she previously has been released pending trial, whether he or she appears as required;

(8) Any facts indicating the possibility of violations of law if the person is released without restrictions; and

(9) Any other facts tending to indicate that the person has strong ties to the community and is not likely to flee the jurisdiction of the court.

(e) The judicial officer may impose one (1) or more of the following conditions of release:

(1) Placing the person under the care of a qualified person or organization agreeing to supervise the person and assist him or her in appearing in court;

(2) Imposing reasonable restrictions on the activities, movements, associations, and residences of the person; and

(3) Imposing any other reasonable restrictions to ensure the appearance of the person at future judicial hearings.

History. Acts 1991, No. 268, §§ 1, 2; 1999, No. 1550, § 1; 2001, No. 1421, § 1; 2001, No. 1678, § 3; 2005, No. 1875, § 3.

Amendments. The 2001 amendment by No. 1421, in (a)(1), substituted “in subdivision (b)(1) of this section” for “herein,” inserted “or within the preceding twelve (12) hours for cases involving physical injury as defined in § 5-1-102(14)” and made minor punctuation changes.

The 2001 amendment by No. 1678, in (b)(2), substituted “any child residing in the household” for “and,” added “and persons who have or have had a child in

common” and made minor grammatical and gender neutral changes throughout.

The 2005 amendment inserted “and persons who are presently or in the past have been in a dating relationship together” in (b)(2); and added (b)(3) and made related changes.

Cross References. First degree assault on family or household member, § 5-26-307.

Domestic abuse definitions, § 9-15-103.

Petition form for protection orders, § 9-15-203.

RESEARCH REFERENCES

UALR L.J. Survey — Family Law, 14
UALR L.J. 799.

16-81-114. Warrantless arrest for gas theft.

(a) Any person who pumps fuel into a vehicle or container, which fuel is the property of a retail business entity that engages in the sale of fuel, and then leaves the premises with the fuel and without paying for the fuel shall be subject to arrest during the four (4) hours following the event, notwithstanding the lack of a warrant for the arrest.

(b) Provided, however, the person arrested shall be released within twenty-four (24) hours of the arrest unless a warrant for the arrest of the person is issued according to law.

History. Acts 1999, No. 1515, § 1.

CASE NOTES

ANALYSIS

Constitutionality.

Construction with other laws.

Constitutionality.

This section, which allows a warrantless arrest for gas theft, is not an unconstitutional violation of the separation of

powers. *State v. Lester*, 343 Ark. 662, 38 S.W.3d 313 (2001).

Construction With Other Laws.

This section, which allows a warrantless arrest for gas theft, is not superseded by Arkansas Rule of Criminal Procedure 4.1. *State v. Lester*, 343 Ark. 662, 38 S.W.3d 313 (2001).

16-81-115. Certified law enforcement officers from adjoining states.

(a) A certified law enforcement officer from an adjoining state who is in Arkansas shall have the authorization to act as described in subsection (b) of this section if the officer is:

(1) Regularly assigned to duty in a municipality that is within one (1) mile of an Arkansas border;

(2) On duty in his or her regularly assigned municipality at the time he or she enters the city limits of the Arkansas municipality; and

(3) Within the city limits of the Arkansas municipality that adjoins the municipality to which the officer is regularly assigned.

(b) If the governing body of an Arkansas municipality authorizes it, a certified law enforcement officer who meets the requirements of subsection (a) of this section:

(1) Has the same powers, duties, and immunities as a certified law enforcement officer of Arkansas who is acting in the discharge of an official duty; and

(2) May enforce Arkansas law and the ordinances of an Arkansas municipality.

History. Acts 2005, No. 272, § 1.

SUBCHAPTER 2 — STOP AND SEARCH

SECTION.

16-81-201, 16-81-202. [Repealed.]

16-81-203. Grounds to reasonably suspect.

SECTION.

16-81-204 — 16-81-209. [Repealed.]

Cross References. Search and Seizure, § 16-82-201 et seq.

Effective Dates. Acts 1969, No. 378, § 10: Apr. 9, 1969. Emergency clause provided: "It is hereby found and determined by the General Assembly that the crime rate in Arkansas is rising at a rapid rate; that the effectiveness of law enforcement agencies has been drastically curtailed by recent court decisions; that in many instances, the crime rate could be reduced and the criminal apprehended before he

commits additional crime if the enforcement officer had authority to stop and search suspects and; that in order to remedy this situation, it is necessary that this Act become effective immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall become effective from and after its passage and approval."

RESEARCH REFERENCES

ALR. Lawfulness of warrantless search of purse or wallet of person arrested or suspected of crime. 29 ALR 4th 771.

Am. Jur. 68 Am. Jur. 2d, Search, § 35 et seq.

Ark. L. Rev. Search of the Person Incident to a Lawful Arrest, 28 Ark. L. Rev. 79.

C.J.S. 79 C.J.S., Search, § 63 et seq.

16-81-201, 16-81-202. [Repealed.]

Publisher's Notes. These sections, concerning limitations on statutory construction and definitions, were repealed by Acts 2005, No. 1994, § 499. The sections were derived from the following sources:

16-81-201. Acts 1969, No. 378, § 6; A.S.A. 1947, § 43-434.

16-81-202. Acts 1969, No. 378, § 5; A.S.A. 1947, § 43-433.

16-81-203. Grounds to reasonably suspect.

The following are among the factors to be considered in determining if the officer has grounds to reasonably suspect:

- (1) The demeanor of the suspect;
- (2) The gait and manner of the suspect;
- (3) Any knowledge the officer may have of the suspect's background or character;
- (4) Whether the suspect is carrying anything, and what he or she is carrying;
- (5) The manner in which the suspect is dressed, including bulges in clothing, when considered in light of all of the other factors;
- (6) The time of the day or night the suspect is observed;
- (7) Any overheard conversation of the suspect;
- (8) The particular streets and areas involved;
- (9) Any information received from third persons, whether they are known or unknown;
- (10) Whether the suspect is consorting with others whose conduct is reasonably suspect;
- (11) The suspect's proximity to known criminal conduct;
- (12) The incidence of crime in the immediate neighborhood;
- (13) The suspect's apparent effort to conceal an article; and
- (14) The apparent effort of the suspect to avoid identification or confrontation by a law enforcement officer.

History. Acts 1969, No. 378, § 7; A.S.A. 1947, § 43-435; Acts 2005, No. 1994, § 249.

Amendments. The 2005 amendment substituted "a law enforcement officer" for "the police" in (14).

CASE NOTES**ANALYSIS**

In general.

Informant's information.

Plain view.

Reasonableness.

"Reasonably suspect."

In General.

This section is merely illustrative, and not exhaustive, of the types of factors that may be considered in forming reasonable suspicion. *Summers v. State*, — Ark. App.

—, — S.W.3d —, 2005 Ark. App. LEXIS 142 (Feb. 16, 2005).

Informant's Information.

Defendant's drug convictions were improper where the police lacked reasonable suspicion to stop him based only on an informant's information that defendant had just bought a "large quantity" of matches; the initial stop and the subsequent search of defendant's home were illegal seizures and, thus, inadmissible. *Summers v. State*, — Ark. App. —, —

S.W.3d —, 2005 Ark. App. LEXIS 142 (Feb. 16, 2005).

Plain View.

Although this section would not justify a warrantless search where officer had no reason to believe defendant was armed and probably dangerous, the plain view exception to the warrant requirement rendered the warrantless search lawful. *Phillips v. State*, 53 Ark. App. 36, 918 S.W.2d 721 (1996).

Reasonableness.

Evidence sufficient to justify police officer arresting defendant for intoxication. *Holmes v. State*, 262 Ark. 683, 561 S.W.2d 56 (1978).

Officer had adequate reason to stop vehicle. *McDaniel v. State*, 20 Ark. App. 201, 726 S.W.2d 688, cert. denied, 484 U.S. 838, 108 S. Ct. 121, 98 L. Ed. 2d 80 (1987).

In determining whether an encounter with defendant was unconstitutional under Rule 3.1 of the Arkansas Rules of Criminal Procedure, the court considered the factors listed in this section and determined that the officer did not have grounds to reasonably suspect defendant enough to warrant the detention and search. *Jennings v. State*, 69 Ark. App. 50, 10 S.W.3d 105 (2000).

Police officers were justified in stopping and searching defendant where defendant and another man were in a high crime area known for drug activity, they stood in a lot beside a vacant house and engaged in a hand-to-hand exchange, when they saw the police officers they separated and walked away, defendant was nervous, and the totality of the circumstances gave rise to a reasonable suspicion sufficient that defendant was engaged in illegal activity. *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003).

Defendant's nervous demeanor and the fact that he shifted his bag away from the drug dog were objective reasons for police officers to stop him and request his identification under Ark. R. Crim. P. 2.2, even though they did not know at that point who defendant was. *Jackson v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 638 (Nov. 4, 2004), cert. denied, — U.S. —, 125 S. Ct. 2266, 161 L. Ed. 2d 1070 (2005).

Motion to suppress evidence was properly denied, even though the trial court erred by finding that no seizure occurred

when defendant was detained outside of a restaurant to wait on a canine sniff of his vehicle, because the officers had specific, particularized, and articulable reasons for suspecting defendant of involvement in the sale of methamphetamine based on the fact that he was following a known associate, who was driving a rental car, and they parked next to each other at the restaurant. *Dowty v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 414 (June 23, 2005).

Officer did not have reasonable suspicion to further detain defendant for a canine sniff after a traffic stop where the officer based the further detention on a one-way rental, a rental in another person's name, nervousness, and the presence of air freshener. *Lilley v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 339 (May 26, 2005).

"Reasonably Suspect."

A reasonable suspicion has been defined as a suspicion based upon facts or circumstances that give rise to more than a bare, imaginary, or purely conjectural suspicion. *Burris v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997).

There was no indication that defendant was committing, had committed, or was about to commit a felony or a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, and the only factor present from this section, supporting a determination that the officer had grounds to "reasonably suspect", was the fact that the neighborhood was a known drug area. *Jennings v. State*, 69 Ark. App. 50, 10 S.W.3d 105 (2000).

Officers lacked reasonable suspicion to stop and detain defendant where the only factors tending to lead to reasonable suspicion for an investigatory stop under Ark. R. Crim. P. 3.1 were the time of day and the incidence of crime in the neighborhood, and where the officers failed to observe any criminal activity or observe a suspicious transaction; officers did not have reasonable suspicion as defined by Ark. R. Crim. P. 2.1, and they were not investigating a particular crime as required by Ark. R. Crim. P. 2.2. *Davis v. State*, 77 Ark. App. 310, 74 S.W.3d 671 (2002).

Where police were patrolling a trailer park known for drug trafficking at 2:00

a.m., and defendant appeared from between two trailers and attempted to evade police, there was a reasonable suspicion that something illegal was afoot to justify a stop; moreover, the trial court properly denied defendant's motion to suppress evidence of cocaine which fell to the ground

when defendant pulled his hand from his pocket. *Jefferson v. State*, 349 Ark. 236, 76 S.W.3d 850 (2002).

Cited: *Stewart v. State*, 332 Ark. 138, 964 S.W.2d 793 (1998); *Hill v. State*, 81 Ark. App. 178, 100 S.W.3d 84 (2003).

16-81-204 — 16-81-209. [Repealed.]

Publisher's Notes. These sections, concerning stopping and detaining, were repealed by Acts 2005, No. 1994, § 500. The sections were derived from the following sources:

16-81-204. Acts 1969, No. 378, § 1; A.S.A. 1947, § 43-429.

16-81-205. Acts 1969, No. 378, § 2; A.S.A. 1947, § 43-430.

16-81-206. Acts 1969, No. 378, § 3; A.S.A. 1947, § 43-431.

16-81-207. Acts 1969, No. 378, § 7; A.S.A. 1947, § 43-435.

16-81-208. Acts 1969, No. 378, § 8; A.S.A. 1947, § 43-436.

16-81-209. Acts 1969, No. 378, § 4; A.S.A. 1947, § 43-432.

SUBCHAPTER 3 — UNIFORM ACT ON INTRASTATE FRESH PURSUIT

SECTION.

16-81-301. Authority of law enforcement officers.

16-81-302. Disposition of prisoner.

SECTION.

16-81-303. Definition.

16-81-304. Construction of act.

16-81-305. Title.

RESEARCH REFERENCES

ALR. Arrest without warrant by identified police officer outside of jurisdiction, when not in fresh pursuit. 34 ALR 4th 328.

Publisher's Notes. For Comments regarding the Intrastate Fresh Pursuit Act, see Commentaries Volume B.

16-81-301. Authority of law enforcement officers.

Any law enforcement officer of this state in fresh pursuit of a person who is reasonably believed to have committed a felony in this state or has committed or attempted to commit any criminal offense in this state in the presence of the officer, or for whom the officer holds a warrant of arrest for a criminal offense, shall have the authority to arrest and hold in custody such person anywhere in this state.

History. Acts 1941, No. 19, § 1; A.S.A. 1947, § 43-501; Acts 2005, No. 1994, § 250.

Amendments. The 2005 amendment substituted "law enforcement" for "peace."

CASE NOTES

ANALYSIS

Construction.

Authority to detain.

Constables.

Fresh pursuit.

Outside jurisdiction.

Territorial jurisdiction.

Warrantless arrest.

Construction.

There are only four instances where the General Assembly has delegated the authority for law enforcement officers to make an arrest outside of their jurisdictions: (1) "fresh pursuit" (§ 16-81-301); (2) when the police officer has a warrant for arrest (§ 16-81-105); (3) when a local law enforcement agency requests an outside officer to come into the local jurisdiction and the outside officer is from an agency that has a written policy regulating its officers when they act outside their jurisdiction (§ 16-81-106(3) and (4)); and (4) when a county sheriff requests that a peace officer from a contiguous county come into that sheriff's county and investigate and make arrests for violations of drug laws (§ 5-64-705). *Henderson v. State*, 329 Ark. 526, 953 S.W.2d 26 (1997).

This section does not conflict with § 16-19-301. *Reed v. State*, 330 Ark. 645, 957 S.W.2d 174 (1997).

Authority to Detain.

Arkansas Rule of Criminal Procedure 3.1 provides that a law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing a felony or misdemeanor involving danger or forcible injury to persons or damage to the identification of the person, or to determine the lawfulness of his conduct. *King v. State*, 42 Ark. App. 97, 854 S.W.2d 362 (1993).

Constables.

Although a constable's general powers and duties are established by § 16-19-301, a constable's authority to engage in the fresh pursuit of criminal suspects, whether suspected of committing felonies or misdemeanors, is derived from this section. *Reed v. State*, 330 Ark. 645, 957 S.W.2d 174 (1997).

A constable is a "peace officer" within

the meaning of this section. *Reed v. State*, 330 Ark. 645, 957 S.W.2d 174 (1997).

Fresh Pursuit.

Where campus patrolman had witnessed traffic offenses and could form a reasonable belief that the defendant was intoxicated, such firsthand information and fact that he began pursuit within his jurisdiction, demonstrated that the patrolman was well within the bounds of his authority when he pursued the defendant for four blocks in the course of fresh pursuit and made the arrest outside the patrolman's jurisdiction. *Smith v. City of Little Rock*, 305 Ark. 168, 806 S.W.2d 371 (1991).

Because police was within his territorial jurisdiction when he first observed defendant driving in a dangerous manner, and began his pursuit of defendant from this point, the subsequent arrest was authorized under the "fresh pursuit" doctrine. *Brown v. State*, 38 Ark. App. 18, 827 S.W.2d 174 (1992).

Outside Jurisdiction.

A local police officer, acting without a warrant outside the territorial limits of the jurisdiction under which he holds office, is without official power to apprehend an offender unless he is authorized to do so by statute, and evidence obtained as a result of an unlawful detention or illegal arrest is subject to the exclusionary rule and should be suppressed. *Perry v. State*, 303 Ark. 100, 794 S.W.2d 141 (1990).

Where police officer initially noticed defendant's erratic driving while both the officer and the defendant were within the city limits, but where the officer waited for an additional period of observation before stopping and arresting the defendant rather than taking a chance of having the case dismissed, the officer had the authority to either stop, or to stop and arrest, the defendant before he left the officer's jurisdiction, and the officer was within the bounds of his authority when he followed defendant outside his jurisdiction and subsequently made the stop and arrest. *King v. State*, 42 Ark. App. 97, 854 S.W.2d 362 (1993).

Territorial Jurisdiction.

The traditional concept of territorial jurisdiction for peace officers is a sound one

since a local community is best served by the requirement that local officers familiar with local neighborhoods make arrests in the community. *Perry v. State*, 303 Ark. 100, 794 S.W.2d 141 (1990).

Warrantless Arrest.

Where county officers had reasonable

grounds or probable cause for the arrest and detention of defendant, warrantless arrest by the officer outside his county was lawful arrest and restraint. *Williams v. State*, 259 Ark. 549, 534 S.W.2d 760 (1976).

Cited: *Davis v. Dahmm*, 763 F. Supp. 1010 (W.D. Ark. 1991).

16-81-302. Disposition of prisoner.

If such an arrest is made in obedience to a warrant, the disposition of the prisoner shall be as in other cases of arrest under a warrant; if the arrest is without a warrant, the prisoner shall without unnecessary delay be taken before a judge or magistrate of the county wherein such an arrest was made.

History. Acts 1941, No. 19, § 2; A.S.A. 1947, § 43-502; Acts 2005, No. 1994, § 269.

Amendments. The 2005 substituted “judge or” for “municipal court or a justice of the peace or other” and deleted “and

such court shall admit each person to bail, if the offense is bailable, by taking security by way of recognizance for the appearance of the prisoner before the court having jurisdiction of such criminal offense” from the end.

CASE NOTES**Presentment Before Magistrate.**

Since the arrest was legal without regard to fresh pursuit, there was no requirement that the defendant be taken

before a local magistrate under this subchapter. *Logan v. State*, 264 Ark. 920, 576 S.W.2d 203 (1979).

16-81-303. Definition.

(a)(1) The term “fresh pursuit” as used in this subchapter shall include:

(A) Fresh pursuit as defined by the common law; and

(B) The pursuit of a person:

(i) Who has committed a felony or is reasonably suspected of having committed a felony in this state;

(ii) Who has committed or attempted to commit any criminal offense in this state in the presence of the arresting law enforcement officer referred to in § 16-81-301; or

(iii) For whom the officer holds a warrant of arrest for a criminal offense.

(2) It shall also include the pursuit of a person suspected of having committed a supposed felony in this state, though no felony has actually been committed, if there is reasonable ground for so believing.

(b) Fresh pursuit as used in this subchapter shall not necessarily imply instant pursuit, but pursuit without unreasonable delay.

History. Acts 1941, No. 19, § 3; A.S.A. 1947, § 43-503; Acts 2005, No. 1994, § 251.

Amendments. The 2005 amendment inserted “law enforcement” in (a)(1)(B)(ii).

CASE NOTES

ANALYSIS

Jurisdiction.
Misdemeanors.
Warrantless arrest.

Jurisdiction.

Where campus patrolman had witnessed traffic offenses and could form a reasonable belief that the defendant was intoxicated, such firsthand information and fact that he began pursuit within his jurisdiction, demonstrated that the patrolman was well within the bounds of his authority when he pursued the defendant for four blocks in the course of fresh pursuit and made the arrest outside the patrolman’s jurisdiction. *Smith v. City of*

Little Rock, 305 Ark. 168, 806 S.W.2d 371 (1991).

Misdemeanors.

The definition of fresh pursuit is broad enough to embrace misdemeanors. *Smith v. City of Little Rock*, 305 Ark. 168, 806 S.W.2d 371 (1991).

Warrantless Arrest.

Evidence sufficient to justify a warrantless arrest by police based upon exigent circumstances, or upon the “fresh pursuit” exception as defined by this section. *Thorne v. State*, 274 Ark. 102, 622 S.W.2d 178 (1981), cert. denied, 455 U.S. 1024, 102 S. Ct. 1726, 72 L. Ed. 2d 144 (1982).

16-81-304. Construction of act.

Section 16-81-301 shall not make unlawful an arrest which would otherwise be lawful.

History. Acts 1941, No. 19, § 4; A.S.A. 1947, § 43-504.

16-81-305. Title.

This subchapter may be cited as the “Uniform Act on Intrastate Fresh Pursuit.”

History. Acts 1941, No. 19, § 5; A.S.A. 1947, § 43-505.

SUBCHAPTER 4 — UNIFORM ACT ON INTERSTATE FRESH PURSUIT

SECTION.

16-81-401. Title.
16-81-402. Purpose.
16-81-403. Definitions.
16-81-404. Member of duly organized peace unit of other state — Authority to arrest and hold.

SECTION.

16-81-405. Member of duly organized peace unit of other state — Procedures upon arrest.
16-81-406. Construction.
16-81-407. Certification of subchapter.

RESEARCH REFERENCES

ALR. Arrest without warrant by identified police officer outside of jurisdiction, when not in fresh pursuit. 34 ALR 4th 328.

Ark. L. Rev. Uniform Act on Interstate Fresh Pursuit, 5 Ark. L. Rev. 364.

16-81-401. Title.

This subchapter may be called the "Uniform Act on Interstate Fresh Pursuit."

History. Acts 1951, No. 211, § 1;
A.S.A. 1947, § 43-511.

16-81-402. Purpose.

The purpose of this subchapter is to prevent criminals from utilizing state lines to handicap our police in their apprehension.

History. Acts 1951, No. 211, § 2;
A.S.A. 1947, § 43-512.

16-81-403. Definitions.

As used in this subchapter the terms:

(1) "Fresh pursuit" shall include fresh pursuit as defined by the common law, and also the pursuit of a person who has committed a felony or who is reasonably suspected of having committed a felony. It shall also include the pursuit of a person suspected of having committed a supposed felony, though no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed. Fresh pursuit as used in this subchapter shall not necessarily imply instant pursuit, but pursuit without unreasonable delay;

(2) "State" shall include the District of Columbia.

History. Acts 1951, No. 211, § 3;
A.S.A. 1947, § 43-513.

16-81-404. Member of duly organized peace unit of other state — Authority to arrest and hold.

Any member of a duly organized state, county, or municipal peace unit of another state of the United States who enters this state in fresh pursuit, and continues within this state in such fresh pursuit, of a person in order to arrest him on the ground that he is believed to have committed a felony in such other state shall have the same authority to arrest and hold such person in custody as has any member of any duly organized state, county, or municipal peace unit of this state to arrest and hold in custody a person on the ground that he is believed to have committed a felony in this state.

History. Acts 1951, No. 211, § 4;
A.S.A. 1947, § 43-514.

**16-81-405. Member of duly organized peace unit of other state —
Procedures upon arrest.**

If an arrest is made in this state by an officer of another state in accordance with the provisions of § 16-81-404, he shall without unnecessary delay take the person arrested before a magistrate of the county in which the arrest was made, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the magistrate determines that the arrest was lawful, he shall commit the person arrested to await for a reasonable time the issuance of an extradition warrant by the Governor of this state or admit him to bail for such purpose. If the magistrate determines that the arrest was unlawful, he shall discharge the person arrested.

History. Acts 1951, No. 211, § 5;
A.S.A. 1947, § 43-515.

CASE NOTES**Damages.**

Where, in a civil rights action, the plaintiffs claimed that their rights were violated when an Oklahoma district attorney falsely arrested them in this state and failed to take them before a magistrate prior to returning them to Oklahoma, the trial court correctly replaced the two

\$5,000 jury awards with nominal damages because the evidence was undisputed that the plaintiffs suffered no damages because of the technical violation of this section. *Cole v. Williams*, 798 F.2d 280 (8th Cir. 1986).

Cited: *Cole v. Williams*, 624 F. Supp. 712 (W.D. Ark. 1985).

16-81-406. Construction.

Section 16-81-404 shall not be construed so as to make unlawful any arrest in this state which would otherwise be lawful.

History. Acts 1951, No. 211, § 6;
A.S.A. 1947, § 43-516.

16-81-407. Certification of subchapter.

Upon the passage and approval by the Governor of this subchapter, it shall be the duty of the Secretary of State to certify a copy of this subchapter to the executive department of each of the states of the United States.

History. Acts 1951, No. 211, § 7;
A.S.A. 1947, § 43-517.

**CHAPTER 82
SEARCH AND SEIZURE****SUBCHAPTER.**

1. GENERAL PROVISIONS.
2. WARRANTS.
3. BODY CAVITY SEARCHES.

Publisher's Notes. Some provisions of this chapter may be superseded by the Arkansas Rules of Criminal Procedure, which became effective January 1, 1976.

Cross References. Stop and Search, § 16-81-201 et seq.

Unreasonable searches and seizures, Ark. Const., Art. 2, § 15.

RESEARCH REFERENCES

ALR. Search and seizure authorized over telephone. 38 ALR 4th 1145.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

16-82-101. Testing for human immunodeficiency virus — Sexual offenses.

SECTION.

16-82-102. Testing for human immunodeficiency virus — Assault and battery.

Effective Dates. Acts 1989, No. 614, § 8: Mar. 16, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that a person with Acquired Immunodeficiency Syndrome (AIDS) or Human Immunodeficiency Virus (HIV) antigen or antibodies who acts irresponsibly with respect to sexual contact or with respect to transfer of blood or blood products constitutes a deadly threat to the public and health and welfare of the people of the state of Arkansas; that the incidence of Acquired Immunodeficiency Syndrome (AIDS) is increasing at an alarming rate and that Acquired Immunodeficiency Syndrome (AIDS) results in enormous social, health and economic costs, ultimately causing premature death of all those infected with Human Immunodeficiency Virus (HIV). Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1993, No. 438, § 7: Mar. 10, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that a person with Acquired Immunodeficiency Syndrome (AIDS), or Human Immunodeficiency Virus (HIV) antigen or antibodies, or Hepatitis who acts irresponsibly with respect to contact with officials performing their official duties constitutes a deadly threat to the public and health and welfare of the people of the State of Arkansas; that the incidence of Acquired Immunodeficiency Syndrome (AIDS), Human Immunodeficiency Virus (HIV), or Hepatitis is increasing at an alarming rate and that these diseases result in enormous social, health and economic costs, ultimately causing premature death of many persons afflicted with these diseases. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

16-82-101. Testing for human immunodeficiency virus — Sexual offenses.

(a) A person with acquired immunodeficiency syndrome (AIDS) or who tests positive for the presence of human immunodeficiency virus (HIV) antigen or antibodies is infectious to others through the exchange of body fluids during sexual intercourse and through the parenteral

transfer of blood or blood products and under these circumstances is a danger to the public.

(b)(1) Any person arrested and charged with violating §§ 5-14-103, 5-14-110, 5-14-124 — 5-14-127, 5-26-202, and 5-70-102 may be required by the court having jurisdiction of the criminal prosecution, upon a finding of reasonable cause to believe that the person committed the offense and subject to constitutional limitations, to be tested for the presence of human immunodeficiency virus (HIV) or any antibody to human immunodeficiency virus (HIV) unless the court determines that testing the defendant would be inappropriate and documents the reasons for that determination in the court record.

(2) The test shall be confidentially administered by a licensed physician, the Division of Health of the Department of Health and Human Services, or a local health department.

(c)(1) If the victim or person with whom the defendant engaged in sexual penetration during the course of the crime consents, the court shall provide the person or agency administering the test with the name, address, and telephone number of the victim or person with whom the defendant engaged in sexual penetration during the course of the crime.

(2) After the defendant is tested as to the presence of human immunodeficiency virus (HIV) or an antibody to human immunodeficiency virus (HIV) the person or agency administering the test shall immediately provide the test results to the victim or person with whom the defendant engaged in sexual penetration during the course of the crime, and shall refer the victim or other person for appropriate counseling.

(d)(1) It shall be mandatory that upon request of the victim, and conviction of the defendant, a court of competent jurisdiction shall order the convicted person to submit to testing to detect in the defendant the presence of the etiologic agent for acquired immunodeficiency syndrome (AIDS).

(2) For purposes of this subsection:

(A) The term “convicted” includes adjudicated under juvenile proceedings; and

(B) The term “sexual offense” shall mean those offenses enumerated in subdivision (b)(1) of this section.

(3) The testing of a person convicted of a sexual offense as enumerated in subdivision (b)(1) of this section shall be conducted by the division upon an order of a circuit court.

(4) The results of any tests performed pursuant to this subsection shall immediately be released to the victim and to the defendant; otherwise, the results of any tests performed shall be confidential and not subject to disclosure as public information under the Freedom of Information Act, § 25-19-101 et seq.

(5) Any victim of a sexual offense as enumerated in subdivision (b)(1) of this section shall, upon request of the victim, receive:

(A) Appropriate counseling;

(B) Human immunodeficiency virus (HIV) testing; and

(C) Referral or delivery for appropriate health care and support services.

History. Acts 1989, No. 614, §§ 1, 5; 1993, No. 616, § 1; 2003, No. 1390, § 6.

Publisher's Notes. Acts 1989, No. 614, § 1, is also codified as §§ 5-14-123(a) and 20-15-904(a).

Amendments. The 2003 amendment,

in (b)(1), deleted “§ 5-14-109, §§ 5-14-120 — 5-14-122” and inserted “5-14-110, 5-14-124 — 5-14-127, 5-26-202.”

Cross References. Sexual offenses generally, § 5-14-101 et seq.

RESEARCH REFERENCES

Ark. L. Rev. Case Note, Criminal Liability for Attempting to Inflict the AIDS Virus: Possibilities in Arkansas' Future, 45 Ark. L. Rev. 505.

UALR L.J. Survey, Criminal Law, 12 UALR L.J. 617.

Legislative Survey, Civil Liberties, 16 UALR L.J. 73.

16-82-102. Testing for human immunodeficiency virus — Assault and battery.

(a) A person with acquired immunodeficiency syndrome (AIDS), or who tests positive for the presence of human immunodeficiency virus (HIV) antigens or antibodies or hepatitis, is infectious to law enforcement officers, fire fighters, and emergency medical technicians through the exchange of body fluids during the course of their duties and through the possible transfer of blood or blood products and under these circumstances is a danger to the public.

(b)(1) Any person arrested and charged with violating any section of § 5-13-101 et seq. by committing an assault or battery upon a law enforcement officer, fire fighter, or emergency medical technician may be required by a court of competent jurisdiction, upon a finding of reasonable cause to believe that the person committed the offense and subject to constitutional limitations, to be tested for the presence of human immunodeficiency virus (HIV), any antibody to human immunodeficiency virus (HIV), or hepatitis unless the court determines that testing the defendant would be inappropriate and documents the reasons for that determination in the court record.

(2) The test shall be confidentially administered by a licensed physician, the Division of Health of the Department of Health and Human Services, or a local health department.

(c)(1) If the law enforcement officer, fire fighter, or emergency medical technician victim with whom the defendant engaged in contact consents, the court shall provide the person or agency administering the test with the name, address, and telephone number of the victim.

(2) After the defendant is tested as to the presence of human immunodeficiency virus (HIV), an antibody to human immunodeficiency virus (HIV), or hepatitis, the person or agency administering the test shall immediately provide the test results to the victim with whom the defendant engaged in contact and shall refer the victim or other person for appropriate counseling.

History. Acts 1993, No. 438, §§ 1-3.

Cross References. Assault and battery generally, §§ 5-13-201 et seq.

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Civil Liberties, 16 UALR L.J. 73.

SUBCHAPTER 2 — WARRANTS

SECTION.

16-82-201. Issuance of search warrants upon oral testimony.

SECTION.

16-82-202. [Repealed.]

16-82-201. Issuance of search warrants upon oral testimony.

(a) **GENERAL RULE.** If the circumstances make it reasonable to dispense with a written affidavit, any judicial officer of this state may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means.

(b) **APPLICATION.**

(1) The person who is requesting the warrant shall prepare a document, in a form approved by the Arkansas Judicial Council, to be known as a duplicate original warrant and shall read such duplicate original warrant verbatim to the judicial officer.

(2) The judicial officer shall enter verbatim what is so read to such magistrate on a document to be known as an original warrant.

(3) The judicial officer may direct that the warrant be modified.

(c) **ISSUANCE.**

(1) If the judicial officer is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the judicial officer shall order the issuance of a warrant by directing the person requesting the warrant to sign the judicial officer's name on the duplicate original warrant.

(2) The judicial officer shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued.

(3) The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(d) **RECORDING AND CERTIFICATION OF TESTIMONY.**

(1) When a caller informs the judicial officer that the purpose of the call is to request a warrant, the judicial officer shall immediately place under oath each person whose testimony forms a basis for the application and each person applying for that warrant.

(2)(A) If a voice recording device is available, the judicial officer shall record by means of the device all of the call after the caller informs the judicial officer that the purpose of the call is to request a warrant.

(B) Otherwise, a stenographic or longhand verbatim record shall be made immediately.

(C) If a voice recording device is used or a stenographic record made, the judicial officer shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court.

(D) If a longhand verbatim record is made, the judicial officer shall file a signed copy with the court.

(e) **CONTENTS.** The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(f) **ADDITIONAL RULE OF EXECUTION.** The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.

(g) **MOTION TO SUPPRESS PRECLUDED.** Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this section is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.

History. Rev. Stat., ch. 45, § 15; C. & M. Dig., § 2890; Pope's Dig., § 3706; Acts 1971, No. 123, §§ 1, 2; A.S.A. 1947, §§ 43-201, 43-205; Acts 1993, No. 961, § 2; Acts 2005, No. 1994, § 439.

Amendments. The 2005 amendment

deleted former (a) through (e); and redesignated former (e)(1) through (e)(7) as present (a) through (g).

Cross References. Permissible objects of seizure, ARCrP 10.2.

CASE NOTES

ANALYSIS

Purpose.

Compliance.

Grounds for issuance.

Jurisdiction.

Malicious prosecution.

Oral testimony.

Purpose.

There is no irreconcilable conflict between the procedural rule, ARCrP 13.1(b), and the substantive statute, subsection (a) of this section; the purpose of subsection (a), providing that warrants could issue "only" upon affidavit sworn to before a magistrate, was not to restrict the issuance of search warrants to affidavits, but to insure that the information presented to magistrates and upon which they relied, was sworn to and recorded to facilitate subsequent review. *Costner v. State*, 318 Ark. 806, 887 S.W.2d 533 (1994).

Compliance.

Burden was on the state to show compliance with this section if it wished to

rely on affidavit and search warrant. *Russ v. Camden*, 256 Ark. 214, 506 S.W.2d 529 (1974).

Where affidavit for search warrant named the police informant, but did not state how the informant was acquainted with the affiant, so that there were no particular facts presented as to the informant's reliability, search warrant did not comply with this section or ARCrP 13.1 and search violated Ark. Const., Art. 2, § 15 and U.S. Const., Amend. 4 and 14. *State v. Prue*, 272 Ark. 221, 614 S.W.2d 221, cert. denied, 454 U.S. 863, 102 S. Ct. 322, 70 L. Ed. 2d 163 (1981). But see *Thompson v. State*, 280 Ark. 265, 658 S.W.2d 350 (1983).

Grounds for Issuance.

Evidence in affidavit insufficient to support issuance of warrant. *Cockrell v. State*, 256 Ark. 19, 505 S.W.2d 204 (1974); *Patterson v. Lockhart*, 513 F.2d 579 (8th Cir. 1975); *Byars v. State*, 259 Ark. 158, 533 S.W.2d 175 (1976).

Evidence furnished sufficient probable

cause for the issuance of a warrant. *Blankenship v. State*, 258 Ark. 535, 527 S.W.2d 636 (1975); *Maxwell v. State*, 259 Ark. 86, 531 S.W.2d 468 (1976); *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993).

There was no violation of defendants' Fourth Amendment rights when officers drove up the driveway to their house looking for a probationer in the area, discovered marijuana growing in plain view, and then obtained a search warrant as a result; further, under subsection (a) of this section, the argument that the warrant was issued by a magistrate in a separate county was of no merit. *Lancaster v. State*, 81 Ark. App. 427, 105 S.W.3d 365 (2003).

Jurisdiction.

Since subsection (a) expressly provides that a search warrant may be issued by any judicial officer, judicial officers are not limited to issuing search warrants only in the counties in which they were elected or appointed. *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993).

City detective testified that, on the date of the search, he contacted the county sheriff's office and asked if they would

send a couple of deputies to assist, and also contacted the city police department and obtained the search warrant, and the city detective was also the officer in charge of the pre-raid briefing, thus, the fact that the warrant was executed in the county's jurisdictional area did not require suppression of the evidence. *State v. Fountain*, 350 Ark. 437, 88 S.W.3d 411 (2002).

Malicious Prosecution.

The procuring and issuance of a search warrant, maliciously and without probable cause, will support an action for damages for malicious prosecution. *Hardin v. Hight*, 106 Ark. 190, 153 S.W. 99 (1913).

Oral Testimony.

This section eliminates from consideration any oral testimony unless it is reduced to writing and accompanied by affidavit. *Cockrell v. State*, 256 Ark. 19, 505 S.W.2d 204 (1974).

Cited: *Durham v. State*, 251 Ark. 164, 471 S.W.2d 527 (1971); *Morris v. State*, 252 Ark. 487, 479 S.W.2d 860 (1972); *Powell v. State*, 260 Ark. 381, 540 S.W.2d 1 (1976).

16-82-202. [Repealed.]

Publisher's Notes. This section, concerning execution of warrants, was repealed by Acts 2005, No. 1994, § 501. The section was derived from Rev. Stat., ch. 45,

§§ 16-18; C. & M. Dig., §§ 2891-2893; Pope's Dig., §§ 3707-3709; A.S.A. 1947, §§ 43-202 — 43-204.

SUBCHAPTER 3 — BODY CAVITY SEARCHES

SECTION.

16-82-301. Refusal and consent.

16-82-302. Performance by public personnel.

SECTION.

16-82-303. Immunity from civil liability.

Effective Dates. Acts 1977, No. 452, § 5; Feb. 17, 1977. Emergency clause provided: "The General Assembly hereby finds that law enforcement officers are hampered in conducting constitutional body cavity searches pursuant to search warrants because hospitals refuse to admit persons for such searches and medical personnel will not perform such searches without written consent from the person

to be searched. Remedial measures must be taken to protect hospitals and medical personnel from civil liability for participating in body cavity searches when the ends of justice require them. Therefore, this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its approval."

16-82-301. Refusal and consent.

No person may refuse to be subjected to a search of his or her body cavities pursuant to Rule 12.3 of the Arkansas Rules of Criminal Procedure, and written consent from the person searched shall not be necessary.

History. Acts 1977, No. 452, § 4;
A.S.A. 1947, § 43-3404.

16-82-302. Performance by public personnel.

Whenever feasible, employees of public institutions and public medical personnel will perform any searches pursuant to Rule 12.3 of the Arkansas Rules of Criminal Procedure.

History. Acts 1977, No. 452, § 3;
A.S.A. 1947, § 43-3403.

16-82-303. Immunity from civil liability.

(a) Any physician or licensed nurse who, pursuant to Rule 12.3 of the Arkansas Rules of Criminal Procedure, when authorized by a search warrant and requested by a law enforcement officer, performs a search of the body cavity of any person is immune from civil liability of any kind arising from the search except for negligence.

(b) Any hospital or clinic where a search pursuant to Rule 12.3 of the Arkansas Rules of Criminal Procedure, authorized by a search warrant, is performed is immune from civil liability of any kind arising from the search except for negligence.

History. Acts 1977, No. 452, §§ 1, 2;
A.S.A. 1947, §§ 43-3401, 43-3402.

CHAPTER 83

CORONER'S INQUEST

SECTION.

16-83-101 — 16-83-114. [Repealed.]

16-83-101 — 16-83-114. [Repealed.]

Publisher's Notes. Sections 16-83-101 — 16-83-106 and §§ 16-83-108 — 16-83-114 were repealed by Acts 1993, No. 1301, § 3. The sections were derived from the following sources:

16-83-101. Rev. Stat., ch. 32, §§ 19, 20; C. & M. Dig., §§ 1586, 1587; Pope's Dig., §§ 1910, 1911; A.S.A. 1947, §§ 42-311, 42-312.

16-83-102. Rev. Stat., ch. 32, § 9; Acts 1893, No. 147, § 1, p. 260; C. & M. Dig.,

§ 1576; Pope's Dig., § 1900; A.S.A. 1947, § 42-301.

16-83-103. Rev. Stat., ch. 32, §§ 10, 11, 34; C. & M. Dig., §§ 1577, 1578, 1601; Pope's Dig., §§ 1901, 1902, 1925; A.S.A. 1947, §§ 42-302, 42-303, 42-326.

16-83-104. Rev. Stat., ch. 32, §§ 12-16; C. & M. Dig., §§ 1579-1583; Pope's Dig., §§ 1903-1907; A.S.A. 1947, §§ 42-304 — 42-308.

16-83-105. Rev. Stat., ch. 32, §§ 17, 18;

C. & M. Dig., §§ 1584, 1585; Pope's Dig., §§ 1908, 1909; A.S.A. 1947, §§ 42-309, 42-310.

16-83-106. Rev. Stat., ch. 32, §§ 21-26; C. & M. Dig., §§ 1588-1593; Pope's Dig., §§ 1912-1917; A.S.A. 1947, §§ 42-313 — 42-318.

16-83-108. Rev. Stat., ch. 32, §§ 29-32; C. & M. Dig., §§ 1596-1599; Pope's Dig., §§ 1920-1923; A.S.A. 1947, §§ 42-321 — 42-324.

16-83-109. Rev. Stat., ch. 32, § 33; C. & M. Dig., § 1600; Pope's Dig., § 1924; A.S.A. 1947, § 42-325.

16-83-110. Acts 1877, No. 59, § 1, p. 62; 1889, No. 59, § 1, p. 74; C. & M. Dig., § 1605; Pope's Dig., § 1929; A.S.A. 1947, § 42-330.

16-83-111. Acts 1965, No. 160, §§ 1, 2; A.S.A. 1947, §§ 42-331, 42-332.

16-83-112. Acts 1979, No. 498, § 1; A.S.A. 1947, § 42-333.

16-83-113. Rev. Stat., ch. 32, §§ 35, 36; C. & M. Dig., §§ 1602, 1603; Pope's Dig., §§ 1926, 1927; A.S.A. 1947, §§ 42-327, 42-328.

16-83-114. Rev. Stat., ch. 32, § 37; C. & M. Dig., § 1604; Pope's Dig., § 1928; A.S.A. 1947, § 42-329.

Section 16-83-107 was repealed by Acts 1989, No. 417, § 7. The section was derived from Rev. Stat., ch. 32, §§ 27, 28; C. & M. Dig., §§ 1594, 1595; Pope's Dig., §§ 1918, 1919; A.S.A. 1947, §§ 42-319, 42-320.

CHAPTER 84

BAIL GENERALLY

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. FORFEITURE.

A.C.R.C. Notes. References to "this chapter" in §§ 16-84-201 — 16-84-206 and subchapter 1 of this chapter may not apply to § 16-84-207 which was enacted subsequently.

Publisher's Notes. Some provisions of this chapter may be superseded by the Arkansas Rules of Criminal Procedure, which became effective January 1, 1976.

Effective Dates. Acts 1989, No. 417, § 8; Mar. 8, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that the present laws on the

regulation of the bail bond business and bail generally are confusing and have been applied in an inconsistent manner; that there is an urgent need for the revision of laws pertaining to bail and that this Act is immediately necessary to eliminate deficiencies found in the present law. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Liability of surety on bail bond taken without authority. 27 ALR 4th 246. Duration of surety's liability on pretrial bond. 32 ALR 4th 504.

Effect on liability of bail bond surety of state's delay in obtaining indictment or bringing defendant to trial. 32 ALR 4th 600.

Effect on surety's liability under bail bond of principal's incarceration in other jurisdiction. 33 ALR 4th 663.

Effect on surety's liability under bail bond of principal's subsequent incarceration in same jurisdiction. 35 ALR 4th 1192.

Am. Jur. 8 Am. Jur. 2d, Bail & R., § 1 et seq.

Ark. L. Rev. Criminal Procedure: A Survey of Arkansas Law and the American Bar Association's Standards, 26 Ark. L. Rev. 169.

C.J.S. 8 C.J.S., Bail, § 29 et seq.

CASE NOTES

Cited: Skelton v. City of Atkins, 317 Ark. 28, 875 S.W.2d 504 (1994), (decision under prior law).

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 16-84-101. Definitions.
- 16-84-102. Persons authorized to take bail.
- 16-84-103. Qualification of surety.
- 16-84-104. Additional security.
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- 16-84-106. Attorneys and officers not to be sureties.
- 16-84-107. Form of bond.
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SECTION.

- 16-84-109. Irregularity of bail bond or recognizance.
- 16-84-110. Bail before conviction.
- 16-84-111. Bail during trial.
- 16-84-112. Entering of recognizance on court minutes.
- 16-84-113. Application for bail.
- 16-84-114. Surrender of defendant.
- 16-84-115. Deposit of money in lieu of bail.
- 16-84-116. Recommitment after bail or deposit of money.

Publisher's Notes. Former subchapter 1, concerning general provisions, was repealed by Acts 1989, No. 417, § 7. The subchapter was derived from the following sources:

16-84-101. Crim. Code, §§ 67, 68; C. & M. Dig., §§ 2943, 2944; Pope's Dig., §§ 3759, 3760; A.S.A. 1947, §§ 43-701, 43-702.

16-84-102. Crim. Code, §§ 72-75; C. & M. Dig., §§ 2945-2948; Pope's Dig., §§ 3761-3764; A.S.A. 1947, §§ 43-703 — 43-706.

16-84-103. Rev. Stat., ch. 116, § 23; C. & M. Dig., § 800; Pope's Dig., § 956; Acts 1963, No. 487, § 1; A.S.A. 1947, § 27-2204.

16-84-104. Crim. Code, § 77; C. & M. Dig., § 2949; Pope's Dig., § 3765; A.S.A. 1947, § 43-707.

16-84-105. Acts 1857, § 1, p. 135; C. & M. Dig., § 801; Pope's Dig., § 957; A.S.A. 1947, § 27-2201.

16-84-106. Crim. Code, § 80; C. & M. Dig., § 2953; Pope's Dig., § 3769; A.S.A. 1947, § 43-708.

16-84-107. Crim. Code, § 70; C. & M. Dig., § 2957; Pope's Dig., § 3773; A.S.A. 1947, § 43-709.

16-84-108. Crim. Code, § 69; C. & M. Dig., § 2956; Pope's Dig., § 3772; A.S.A. 1947, § 43-710.

16-84-109. Rev. Stat., ch. 45, § 236; C. & M. Dig., § 2954; Pope's Dig., § 3770; A.S.A. 1947, § 43-711.

16-84-110. Crim. Code, § 76; C. & M. Dig., § 2955; Pope's Dig., § 3771; A.S.A. 1947, § 43-712.

16-84-111. Crim. Code, §§ 78, 79; Acts 1871, No. 49, § 1 [79], p. 255; 1875 (Adj. Sess.), No. 9, § 1, p. 10; C. & M. Dig., §§ 2950-2952; Pope's Dig., §§ 3766-3768; A.S.A. 1947, §§ 43-713 — 43-715.

16-84-112. Crim. Code, §§ 81-83; C. & M. Dig., §§ 2961-2963; Pope's Dig., §§ 3777-3779; A.S.A. 1947, §§ 43-716 — 43-718.

16-84-113. Crim. Code, §§ 84-87; C. & M. Dig., §§ 2964-2967; Pope's Dig., §§ 3780-3783; A.S.A. 1947, §§ 43-719 — 43-722.

16-84-114. Crim. Code, §§ 96, 97; C. & M. Dig., §§ 2975, 2976; Pope's Dig., §§ 3791, 3792; A.S.A. 1947, §§ 43-730, 43-731.

16-84-115. Acts 1959, No. 268, § 1; A.S.A. 1947, § 43-732.

Cross References. Bail upon arrest, § 16-81-109.

Excessive bail not required, Ark. Const., Art. 2, § 9.

Habeas corpus to obtain bail, § 16-112-103.

Traffic offenses, bail by depositing operator's license, § 27-50-606.

16-84-101. Definitions.

As used in this chapter:

(1) "Admission to bail" means an order from a competent court or magistrate that the defendant be discharged from actual custody on bail and fixing the amount of the bail;

(2) "Direct supervision" means the person is in the physical presence of and acting pursuant to instructions from an Arkansas-licensed bail bond agent;

(3) "Professional bail bondsman" means an individual licensed as a professional bail bondsman by the Professional Bail Bond Company and Professional Bail Bondsman Licensing Board pursuant to § 17-19-201 et seq.;

(4) "Professional bail bond company" means a person holding a professional bail bond company license issued by the Professional Bail Bond Company and Professional Bail Bondsman Licensing Board pursuant to § 17-19-201 et seq.;

(5) "Surety" means the person who becomes the surety for the appearance of the defendant in court; and

(6)(A) "Taking of bail" or "take bail" means the acceptance by a person authorized to take bail of the undertaking of a sufficient surety for the appearance of the defendant according to the terms of the undertaking, or that the surety will pay to the court the sum specified.

(B) "Taking of bail" or "take bail" shall not include the fixing of the amount of bail and no person other than a competent court or magistrate shall fix the amount of bail.

History. Acts 1989, No. 417, § 5; 1997, No. 973, § 1; 2001, No. 1387, § 1.

Publisher's Notes. "This code," referred to in this section, means the Code of Practice in Criminal Cases of 1869. See

parallel reference tables in the tables volume.

Amendments. The 2001 amendment inserted (2).

CASE NOTES**Endorsement of Bail-Bond.**

The endorsement upon a bail-bond of the approval of the officer taking it is not essential to its validity. *Adler v. State*, 35 Ark. 517 (1880).

Cited: *Almond v. Countryside Cas. Co.*, 329 F. Supp. 137 (W.D. Ark. 1971); *Holt Bonding Co. v. Nichols*, 988 F. Supp. 1232 (W.D. Ark. 1997).

16-84-102. Persons authorized to take bail.

(a) The following may take bail:

(1) A judge, magistrate, or clerk of the court;

(2) A sheriff or deputy sheriff with respect to any person committed to the common jail of the county;

(3) Any law enforcement officer designated by a municipal police department with respect to any person committed to a municipal jail; and

(4) A law enforcement officer making an arrest as authorized under § 16-81-109.

(b) A constable shall not take bail.

History. Acts 1989, No. 417, § 5; 2005, No. 1994, § 270.

Amendments. The 2005 amendment, in (a)(1), substituted “judge, magistrate

or” for “competent court” and “court” for “court, or magistrate”; and, in (a)(3), substituted “law enforcement” for “police” and added “and” at the end.

CASE NOTES

ANALYSIS

Discretion.
Exemption laws.

Discretion.

Taking of bail by a sheriff is a discretionary act and mandamus will not lie to compel its performance. *United Bonding Co. ex rel. Richmond v. Johnson*, 293 Ark. 467, 739 S.W.2d 147 (1987).

Sheriff's refusal to accept bonds from a particular bonding company amounted to a suspension of the bonding company's

authority to issue bonds, which was equivalent to an impermissible suspension of the company's license. *Holt Bonding Co. v. Nichols*, 988 F. Supp. 1232 (W.D. Ark. 1997).

Exemption Laws.

A bail-bond is a debt by contract, and the exemption laws apply to a judgment and execution on it. *State v. Williford*, 36 Ark. 155 (1880).

Cited: *Almond v. Countryside Cas. Co.*, 329 F. Supp. 137 (W.D. Ark. 1971).

16-84-103. Qualification of surety.

(a) The surety shall be:

(1) A professional bail bondsman acting through a professional bail bond company; or

(2) A resident of the state, owner of visible property, over and above that exempt from execution, to the value of the sum in which bail is required, and shall be worth that amount after the payment of the surety's debts and liabilities.

(b)(1)(A)(i) The person or persons offered as surety shall be examined on oath in regard to qualifications as surety, and any officer authorized to take bail is authorized to administer the oath, reduce the statements on oath to writing, and require the person or persons offered as surety to sign the statement.

(ii) Other proof may also be taken in regard to the sufficiency of the surety.

(B) Prior to submission to the court or magistrate, the statement shall also be signed by the sheriff or chief of police in the jurisdiction where the defendant is charged.

(2) Proof that the surety is a licensed professional bail bondsman shall be deemed sufficient proof of the sufficiency of the surety, and the surety shall be accepted by all courts in this state or by any individual authorized to take bail under the provisions of § 16-84-102.

(c) No person shall be taken as surety unless the court or magistrate is satisfied, from proof and examination on oath, of the sufficiency of the person according to the requisitions of subsection (b) of this section.

(d) Where more than one (1) person is offered as surety, they shall be deemed sufficient if, in the aggregate, they possess the qualifications required.

History. Acts 1989, No. 417, § 5; 1997, substituted “shall” for “may” in (b)(2); and No. 973, § 2; 2003, No. 1648, § 1. made minor stylistic changes.

Amendments. The 2003 amendment

CASE NOTES

Cited: Holt Bonding Co. v. Nichols, 988 F. Supp. 1232 (W.D. Ark. 1997).

16-84-104. Additional security.

There shall be no rules, regulations, or requirements enacted by any judge, magistrate, sheriff, or other officer of the court, requiring any professional bail bondsman or professional bail bond company to post any sum of security in addition to that required by the Professional Bail Bond Company and Professional Bail Bondsman Licensing Board pursuant to § 17-19-205 as a requirement for acceptance or writing bail bonds.

History. Acts 1989, No. 417, § 5; 1997, No. 973, § 3.

CASE NOTES

Cited: Suit v. State, 212 Ark. 584, 207 S.W.2d 315 (1947); Almond v. Countryside Cas. Co., 329 F. Supp. 137 (W.D. Ark. 1971); Liberty Bonding Co. v. State, 270 Ark. 434, 604 S.W.2d 956 (1980).

16-84-105. Responsibility of officer taking bail.

(a) The officer who takes bail shall be officially responsible for the sufficiency of the surety if taken other than through a professional bail bondsman.

(b) If the surety is not a professional bail bondsman, and the defendant has not yet appeared before a judicial officer pursuant to Rule 9 of the Arkansas Rules of Criminal Procedure, the officer shall file a statement with the court describing the property of the surety upon which the sufficiency of the surety is based. The description of the property shall include the value of the property. The statement shall also be signed by the sheriff or chief of police in the jurisdiction where the defendant is charged.

(c) The officer who takes bail shall give a prenumbered written receipt for the collateral. The receipt shall give in detail a full account of the collateral received.

(d) An officer who takes bail shall not be liable for any bond ordered by a judicial officer under Rule 9.2(b)(i) or (ii) of the Arkansas Rules of Criminal Procedure.

History. Acts 1989, No. 417, § 5; 1995, No. 470, § 1.

16-84-106. Attorneys and officers not to be sureties.

No attorney, solicitor, or counselor at law or in equity, clerk, sheriff, chief of police, law enforcement officer, or other person concerned in the execution of any process, shall become a personal guarantor or surety in any criminal proceeding.

History. Acts 1989, No. 417, § 5; 1997, No. 1046, § 1.

CASE NOTES

ANALYSIS

Joint bond.

Loss and renewal of indictment.

Recitals of bond.

Venue.

Joint Bond.

A bail-bond is not joint because it is the the joint bond of two or more for the same sum that was required by each of them. *Humphries v. State*, 33 Ark. 713 (1878).

Loss and Renewal of Indictment.

Where the indictment is lost or destroyed, and new indictment is found against the defendant for the same offense, his bail for appearance to the first indictment will be liable for the penalty of the bond, if he fails to appear and answer the second indictment. *Price v. State*, 42 Ark. 178 (1883).

Recitals of Bond.

Sureties on a bail-bond are bound by recitals of bond. *Harris v. State*, 60 Ark. 209, 29 S.W. 640 (1895).

Venue.

When a change of venue is granted on the application of the defendant, who is at large on bail and he is ordered into the custody of the sheriff of the county to which venue is changed, the right of the bail is impaired and his liability is at an end. *State v. Jones*, 29 Ark. 127 (1874).

Sureties on bail-bond are estopped to deny venue. *Harris v. State*, 60 Ark. 209, 29 S.W. 640 (1895).

The surety on a bail-bond is not exonerated by an order made on the application of the defendant changing the venue of the action where it is ordered that he stand upon his bail. *Beasley v. State*, 53 Ark. 67, 13 S.W. 733 (1890).

16-84-107. Form of bond.

(a) The undertaking of the surety, other than by a professional bail bondsman, shall be substantially as follows:

"A.B., being in custody, charged with the offense of (naming or briefly describing it), and being admitted to bail in the sum of dollars, we C.D., of (stating his place of residence), and E.F., of (stating his place of residence), hereby undertake that the above named A.B. shall appear in the court on the day of its term to answer said charge, and shall at all times render himself or herself amenable to the orders and process of said court in prosecution of said charge, and, if convicted, shall render himself in execution thereof; or if he fail to perform either of these conditions, that we will pay to the appropriate court the sum of dollars."

(b) If the surety is a professional bail bondsman, the undertaking of the surety shall be in a form prescribed by the regulations of the

Professional Bail Bond Company and Professional Bail Bondsman Licensing Board.

History. Acts 1989, No. 417, § 5; 1997, No. 973, § 4.

CASE NOTES

Cited: *Almond v. Countryside Cas. Co.*, 329 F. Supp. 137 (W.D. Ark. 1971).

16-84-108. Bonds not void for want of form.

No prosecution, appeal, nonresident, or attachment bond, nor any other statutory bonds of any party, plaintiff, or defendant in any court of justice, in this state, nor any recognizance in any criminal cause in this state, shall be declared null and void for the want of form if the intent of the bond can be plainly deduced from the body of the bond or recognizance.

History. Acts 1989, No. 417, § 5.

Cross References. Defendant on bail for felony indictment, § 16-89-106.

CASE NOTES

Cancelation of Bail.

Trial court did not abuse discretion in ordering that defendant, who was on bail, be taken into custody during the trial when it was brought to the court's attention that he had indicated that he might

attempt to fix or tamper with the petit jury. *Reaves v. State*, 229 Ark. 453, 316 S.W.2d 824 (1958), cert. denied, 359 U.S. 944, 79 S. Ct. 723, 3 L. Ed. 2d 676 (1959).

Cited: *Suit v. State*, 212 Ark. 584, 207 S.W.2d 315 (1947).

16-84-109. Irregularity of bail bond or recognizance.

(a) No bail bond or recognizance shall be deemed to be invalid by:

(1) Reason of any variance between its stipulations and the provisions of this chapter;

(2) The failure of the judge or magistrate or officer to transmit or deliver the bail bond or recognizance at the times provided in this subchapter; or

(3) Any other irregularity so that it is made to appear that the defendant was:

(A) Legally in custody;

(B)(i) Charged with the public offense; and

(ii) Discharged from the offense by reason of the giving of the bond or recognizance; and

(C) Can be ascertained from the bond or recognizance, that the surety undertook that the defendant should appear before a judge or magistrate for the trial of the offense.

(b)(1) If no day is fixed for the appearance, or an impossible day, or a day in vacation, the bond or recognizance, if for his or her appearance

before a judge or magistrate, shall be considered as binding the defendant so to appear and surrender himself or herself into custody for an examination of the charge in twenty (20) days from the time of his or her giving the bond or recognizance.

(2) The bond or recognizance, if for his or her appearance for trial in court, shall be considered as binding the defendant to appear and surrender himself or herself into custody on the first day of the next term of the court which shall commence more than ten (10) days after the giving of the bond or recognizance.

History. Acts 1989, No. 417, § 5; 2005, No. 1994, § 271. inserted “judge or” twice in (a) and in (b); inserted “or she” in (a); and inserted “or her” and “or herself” throughout (b).

Amendments. The 2005 amendment

16-84-110. Bail before conviction.

Before conviction, the defendant may be admitted to bail for his or her appearance:

(1) Before a judge or magistrate for an examination of the charge, where the offense charged is a misdemeanor;

(2) In the court to which he or she is sent for trial;

(3) To answer an indictment which has been found against him or her; or

(4) In a criminal action.

History. Acts 1989, No. 417, § 5; 2005, No. 1994, § 271. guage and in (3); inserted “judge or” in (1); inserted “or she” in (2); and substituted “criminal” for “penal” in (4).

Amendments. The 2005 amendment inserted “or her” in the introductory lan-

CASE NOTES

ANALYSIS

Evidence.
Review.

Evidence.

On application for bail in a criminal case, the court will give the prisoner the benefit of any reasonable doubts that may

arise in considering the testimony. *Ex parte Bird & Bailey*, 24 Ark. 275 (1866).

Review.

The Supreme Court has power to review, on certiorari, the decision of a circuit judge refusing bail. *Ex parte Harbour*, 39 Ark. 126 (1882).

16-84-111. Bail during trial.

(a) During the trial of an indictment for a misdemeanor, the defendant may remain on bail.

(b) However, for a felony when a defendant is upon bail, he or she may remain upon bail or be kept in actual custody as the court may direct. If the defendant remains on bail, any surety’s liability shall be exonerated unless the surety has agreed to remain as the surety until final judgment is rendered.

History. Acts 1989, No. 417, § 5.

Cross References. Taking of bail,
§ 16-81-109.

CASE NOTES

ANALYSIS

Construction with other laws.
Discretion.

Construction With Other Laws.

The is no conflict between § 16-84-111(b) and Arkansas Rules of Criminal Procedure Rule 9.2(e). Bobby Cox Bail

Bonds, Inc. v. State, 71 Ark. App. 119, 36 S.W.3d 752 (2000).

Discretion.

Taking of bail by a sheriff is a discretionary act and mandamus will not lie to compel its performance. United Bonding Co. ex rel. Richmond v. Johnson, 293 Ark. 467, 739 S.W.2d 147 (1987).

16-84-112. Entering of recognizance on court minutes.

All recognizances required or authorized to be taken in any criminal proceeding, in open court, by any court of record shall be entered on the minutes of the court, and the substance thereof shall be read to the person recognized.

History. Acts 1989, No. 417, § 5.

CASE NOTES

ANALYSIS

Applicability.
Cause to surrender.
Substantial compliance.
Surrender without cause.

Applicability.

Where bondsmen permitted their principal to leave the state to avoid trial and failed to appear at a hearing upon a show-cause order but later found their principal and returned him to custody, this section was not applicable. Craig v. State, 257 Ark. 112, 514 S.W.2d 383 (1974).

Cause to Surrender.

When a bondsman has reasonable cause to believe that a defendant has committed a felony while released on bond, he has cause to surrender the defendant. Johnson v. Hicks, 288 Ark. 158, 702 S.W.2d 797 (1986).

Substantial Compliance.

Although surrender was made to a person without authority, the surety was relieved from responsibility where the surrender seemed regular, according to law and in good faith, and without collusion

for the escape of the prisoner. Carter v. State, 43 Ark. 132 (1884).

Substantial compliance with this section is all that is necessary to release the bail so that a surrender of the principal by the bail releases the latter although a receipt from the sheriff is not taken and the surrender was made without a certified copy of the bond. Hester v. State, 145 Ark. 347, 224 S.W. 618 (1920).

Surrender Without Cause.

The bondsman may surrender the defendant without cause pursuant to this section only if the consideration for making the bond is returned to the defendant. Troutt v. Langston, 283 Ark. 220, 675 S.W.2d 625 (1984).

If surrender is without cause, the contract for bond implies that the bondsman must return the premium; however, if the surrender is with cause, there is no implied contract to return the fee. Johnson v. Hicks, 288 Ark. 158, 702 S.W.2d 797 (1986).

Cited: Flynn v. Greene County, 12 Ark. App. 386, 676 S.W.2d 766 (1984); United Bonding Co. ex rel. Richmond v. Johnson, 293 Ark. 467, 739 S.W.2d 147 (1987).

16-84-113. Application for bail.

(a) If the defendant is committed to jail and the application for bail is made to a judge or magistrate during vacation, it must be by written petition signed by the defendant or his or her counsel briefly stating the offense for which he or she is committed and naming the persons offered as surety.

(b) In all other cases, the application may be made orally to the judge or magistrate.

History. Acts 1989, No. 417, § 5; 2005, No. 1994, § 272.

Amendments. The 2005 amendment, in (a), substituted "judge or magistrate"

for "magistrate, or judge of the circuit court" and inserted "or her" and "or she"; and substituted "judge" for "court" in (b).

CASE NOTES**ANALYSIS**

Garnishment.
Interveners.

Garnishment.

Money deposited under this section in lieu of bail is not deemed to belong to the defendant and cannot be subject to garnishment for the debts of the criminal defendant. *Cessna Fin. Corp. v. Skelton*, 287 Ark. 378, 700 S.W.2d 44 (1985).

Interveners.

Where one arrested for unlawfully selling mortgaged cattle deposited the proceeds of the sale in lieu of bail, the mortgagee could intervene and claim the money. *Imperial Valley Sav. Bank v. Huff*, 126 Ark. 281, 190 S.W. 116 (1916).

Cited: *Almond v. Countryside Cas. Co.*, 329 F. Supp. 137 (W.D. Ark. 1971).

16-84-114. Surrender of defendant.

(a)(1) At any time before the forfeiture of their bond, the surety may surrender the defendant or the defendant may surrender himself or herself to the jailer of the county in which the offense was committed.

(2) However, the surrender must be accompanied by a certified copy of the bail bond to be delivered to the jailer, who must detain the defendant in custody thereon as upon a commitment and give a written acknowledgment of the surrender.

(3) The surety shall thereupon be exonerated.

(b)(1) For the purpose of surrendering the defendant, the surety may obtain from the officer having in his or her custody the bail bond or recognizance a certified copy thereof, and thereupon at any place in the state may arrest the defendant.

(2) No person other than an Arkansas-licensed bail bond agent, an Arkansas-licensed private investigator, a certified law enforcement officer, or a person acting under the direct supervision of an Arkansas-licensed bail bond agent shall be authorized to apprehend, detain, or arrest a defendant on a bail bond, wherever issued, unless that person is licensed as a bail bond agent by the state where the bail bond was written.

(3) No person shall represent himself or herself to be a bail enforcement agent, bounty hunter, or similar title in this state.

(4) Any bail bond agent attempting to apprehend a defendant shall notify the local law enforcement agency or agencies of his or her presence and provide the local law enforcement agency or agencies with the defendant's name, charges, and suspected location.

(5) Any person who violates any provision of this section shall be guilty of a Class D felony.

(c) The surety may arrest the defendant without the certified copy.

(d) If the surety has good cause for surrendering the defendant and has complied with the provisions of this section in surrendering the defendant, there shall be no requirement that the surety return part or all of the premium paid for the bail bond.

History. Acts 1989, No. 417, § 5; 1995, No. 593, § 1; 1999, No. 1445, § 1; 2001, No. 1387, § 2.

Amendments. The 2001 amendment, in (b)(2), inserted "Arkansas-licensed bail

bond agent, an," deleted "or" following "investigator," and substituted "bail bond agent" for "private investigator or certified law enforcement officer."

CASE NOTES

Forfeiture.

A forfeiture becomes effective when announced; thus where defendant surrendered before the entry of judgment, but after forfeiture was announced, the bond-

ing company was not entitled to complete exoneration. *A-1 Bonding v. State*, 64 Ark. App. 135, 984 S.W.2d 29 (1998).

Cited: *Almond v. Countryside Cas. Co.*, 329 F. Supp. 137 (W.D. Ark. 1971).

16-84-115. Deposit of money in lieu of bail.

Notwithstanding any rule of criminal procedure to the contrary:

(1)(A) Whenever the defendant is admitted to bail in a specified sum, he or she may deposit the sum with the proper city or county official in the city or county in which the trial is directed to be had and take from the official a receipt of the deposit, upon delivering which to the officer in whose custody he or she is, he or she shall be discharged.

(B) After bail has been taken, a deposit may in like manner be made of the sum mentioned in the bail bond, which shall exonerate the surety.

(2) Where money is deposited, the proper city or county official shall hold and pay the money according to the orders of the court having jurisdiction to try the offense, and he or she and his or her sureties shall be liable for the money on their official bond.

(3) Upon judgment being rendered against a defendant for fine and costs, the court rendering judgment may order any money deposited agreeably to this section to be applied to the payment thereof. This subdivision (a)(3) shall not apply to a bail bond of a bail bondsman.

(4) The mayor shall designate the city official or officials who may accept a deposit of money in lieu of bail, and the county judge shall designate the county official or officials authorized to accept a deposit of money in lieu of bail.

History. Acts 1989, No. 417, § 5; 1991, No. 720, § 1.

CASE NOTES

ANALYSIS

Construed with § 17-19-101 et seq.
Effect of amendments.
Fines.

Construed with § 17-19-101 et seq.

This section gives courts the power to regulate the business of bondsmen, while § 17-19-101 et seq. merely states that the Insurance Department has the authority to administer § 17-19-101 et seq. and issue rules and regulations to that end. The Insurance Department must have the authority to effect the purpose of § 17-19-101 et seq., and the courts must have the authority to regulate their own business; thus, this section and § 17-19-101 et seq. are reconcilable in that regard. However, this section and § 17-19-101 are in conflict insofar as this section allows judges to fix the maximum amount of fees, while § 17-19-101 et seq. fixes the maximum amount. Section 17-19-101 et seq. controls and amends this section by implication in that respect; otherwise, the two acts are not in conflict and, therefore, there is no

repeal of this section by implication. *Miller v. Pulaski County Cir. Court*, 284 Ark. 55, 679 S.W.2d 187 (1984).

Effect of Amendments.

Prior to 1989, subdivision (3) of this section was codified as § 16-84-113(c) and did not contain the provision that the subdivision did not apply to bail bondsmen. *Story v. State*, 326 Ark. 86, 929 S.W.2d 709 (1996).

Fines.

This section authorized the court to order the money deposited by the defendant to be applied to his unpaid fine where the defendant failed to prove that the money was deposited by a bail bondsman. *Story v. State*, 326 Ark. 86, 929 S.W.2d 709 (1996).

Cited: *Parrott v. State*, 246 Ark. 672, 439 S.W.2d 924 (1969); *Thomas v. State*, 260 Ark. 512, 542 S.W.2d 284 (1976); *Miller v. Lofton*, 279 Ark. 461, 652 S.W.2d 627 (1983); *Skelton v. City of Atkins*, 317 Ark. 28, 875 S.W.2d 504 (1994), (decision under prior law).

16-84-116. Recommitment after bail or deposit of money.

(a) The court in which a prosecution for a public offense is pending may, by an order, direct the defendant to be arrested and committed to jail until legally discharged, after he or she has given bail, or deposited money in lieu thereof, in the following cases:

(1) When by having failed to appear, a forfeiture of bail or of the money deposited has been incurred;

(2) When the court is satisfied that his or her surety, or either of them, is dead, or insufficient, or has moved from the state;

(3) Upon an indictment's being found for an offense not bailable.

(b) Upon the order being made, the clerk shall issue process for the arrest and recommitment of the defendant. If the order is made on account of either of the cases mentioned in subdivision (a)(1) or (a)(2) of this section, the defendant shall be admitted to bail as upon his or her first commitment, in a sum to be fixed by the court and named in the process for his or her arrest.

History. Acts 1989, No. 417, § 5.

SUBCHAPTER 2 — FORFEITURE

SECTION.

16-84-201. Action on bond in district courts.

16-84-202. Disposition of deposit.

16-84-203. Certain absences excused.

SECTION.

16-84-204 — 16-84-206. [Repealed.]

16-84-207. Action on bail bond in circuit courts.

Publisher's Notes. Former subchapter 2, concerning forfeiture, was repealed by Acts 1989, No. 417, § 7. The subchapter was derived from the following sources:

16-84-201. Crim. Code, §§ 88, 89; C. & M. Dig., §§ 2968, 2969; Pope's Dig., §§ 3784, 3785; Acts 1971, No. 109, § 1; A.S.A. 1947, §§ 43-723 — 43-724.

16-84-202. Crim. Code, § 90; C. & M. Dig., § 2970; Pope's Dig., § 3786; A.S.A. 1947, § 43-725.

16-84-203. Crim. Code, §§ 91, 92; C. &

M. Dig., §§ 2971, 2972; Pope's Dig., §§ 3787, 3788; Acts 1953, No. 390, § 1; A.S.A. 1947, §§ 43-726, 43-727.

16-84-204. Crim. Code, § 93; C. & M. Dig., § 2973; Pope's Dig., § 3789; A.S.A. 1947, § 43-728.

16-84-205. Crim. Code, § 94; C. & M. Dig., § 2974; Pope's Dig., § 3790; A.S.A. 1947, § 43-729.

16-84-206. Acts 1963, No. 497, § 1; A.S.A. 1947, § 43-733.

RESEARCH REFERENCES

Am. Jur. 8 Am. Jur. 2d, Bail & R., § 144 et seq.

CASE NOTES

Forfeiture Not a Fine.

Under state law, forfeiture of a bail bond is not synonymous with a fine in its ordinary sense. *Almond v. Countryside Cas. Co.*, 329 F. Supp. 137 (W.D. Ark. 1971), *aff'd*, 455 F.2d 503 (8th Cir. 1972).

Cited: *Phillips v. State*, 100 Ark. 515, 140 S.W. 734 (1911); *Central Cas. Co. v. State*, 233 Ark. 832, 349 S.W.2d 135 (1961).

16-84-201. Action on bond in district courts.

(a)(1)(A) If the defendant fails to appear for trial or judgment, or at any other time when his or her presence in district court may be lawfully required, or to surrender himself or herself in execution of the judgment, the district court may direct the fact to be entered on the minutes and shall promptly issue an order requiring the surety to appear, on a date set by the district court not more than one hundred twenty (120) days after the issuance of the order, to show cause why the sum specified in the bail bond or the money deposited in lieu of bail should not be forfeited.

(B) The one hundred twenty-day period in which the defendant must be surrendered or apprehended pursuant to subdivision (c)(2) of this section begins to run from the date notice is sent by certified mail to the surety company at the address shown on the bond, whether or not it is received by the surety.

(2) The order shall also require the officer who was responsible for taking of bail to appear unless:

(A) The surety is a bail bondsman; or

(B) The officer accepted cash in the amount of bail.

(b) The appropriate law enforcement agencies shall make every reasonable effort to apprehend the defendant.

(c)(1) If the defendant is surrendered or arrested, or good cause is shown for his or her failure to appear before judgment is entered against the surety, the district court shall exonerate a reasonable amount of the surety's liability under the bail bond.

(2) However, if the surety causes the apprehension of the defendant or the defendant is apprehended within one hundred twenty (120) days from the date of receipt of written notification to the surety of the defendant's failure to appear, no judgment or forfeiture of bond may be entered against the surety, except as provided in subsection (e) of this section.

(d) If after one hundred twenty (120) days, the defendant has not surrendered or been arrested, the bail bond or money deposited in lieu of bail may be forfeited without further notice or hearing.

(e) If the defendant is located in another state and the location is known within one hundred twenty (120) days after the date of receipt of written notification to the surety of the defendant's failure to appear, the appropriate law enforcement officers shall cause the arrest of the defendant and the surety shall be liable for the cost of returning the defendant to the district court in an amount not to exceed the face value of the bail bond.

(f)(1) In determining the extent of liability of the surety on a bond forfeiture, the court, without further notice or hearing, may take into consideration the expenses incurred by the surety in attempting to locate the defendant and may allow the surety credit for the expenses incurred.

(2) To be considered by the court, information concerning expenses incurred in attempting to locate the defendant should be submitted to the court by the surety no later than the one-hundred-twentieth day after the date of receipt of written notification to the surety of the defendant's failure to appear.

History. Acts 1989, No. 417, § 5; 1991, No. 991, § 1; 1993, No. 841, § 1; 1995, No. 1106, § 1; 1999, No. 567, § 5; 2003, No. 752, § 2; 2003, No. 1572, § 1.

Amendments. The 2003 amendment by No. 752, throughout the section, inserted "district" preceding "court" and made gender neutral changes.

The 2003 amendment by No. 1572, in (d), deleted "prior to judgment against the surety" following "arrested" and added

"without further notice or hearing"; in (e), deleted "before judgment is entered against the surety" from the beginning, inserted "within one hundred twenty ... to appear" and made stylistic changes; re-designated former (f) as present (f)(1) and inserted "without further notice or hearing" following "the court"; and added (f)(2).

Cross References. Jurisdiction of present courts, Ark. Const. Amend. 80, § 19(B).

CASE NOTES

ANALYSIS

Burden of proof.
Credit for expenses.
Effect of amendments.
Failure to appear.
Forfeiture upheld.
Notice to surety.
Recovery of bail.
Show-cause order.

Burden of Proof.

Where a bonding company contends that the statutory notice required under subsection (a)(1)(A) of this section was defective because it was not sent to the address shown on the bond, the bonding company has the burden to show that the circuit court administrator sent the notice to the wrong address based on the bail bond. *Bonding v. State*, 340 Ark. 641, 13 S.W.3d 147 (2000).

Where bondsman filed a motion to set aside a bond-forfeiture order more than 98 days after the forfeiture, the trial court lacked jurisdiction at the subsequent hearing to act on the motion to set aside the judgment because the 90 period provided for under Ark. R. Civ. P. 60(a) had elapsed and the bondsman had not met his burden of proof under this section to show cause to the trial court as to why the bond should not be forfeited. *Arvis Harper Bail Bonds, Inc. v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 396 (May 18, 2005).

Credit for Expenses.

The trial court correctly complied with subdivision (c)(1) where the defendant was surrendered after the forfeiture but prior to entry of the judgment, and the trial court credited the appellant bonding company with \$15,000 against the \$75,000 forfeited bond as a setoff for funds expended in apprehending the defendant. *A-1 Bonding v. State*, 64 Ark. App. 135, 984 S.W.2d 29 (1998).

Effect of Amendments.

Until 1989, the trial court had discretion to remit the whole or a part of the amount specified in the bond agreement if the defendant was surrendered or arrested prior to entry of the forfeiture judgment against the surety; in 1989, however, the General Assembly amended

subsection (c) to require the trial court to exonerate a reasonable amount of the surety's liability under the bail bond if, prior to entry of the judgment against the surety, the defendant was surrendered, arrested or good cause was shown for his nonappearance; in 1991, the General Assembly again amended subsection (c) to add a new second sentence to provide that, after the defendant's nonappearance, if the surety caused the apprehension of the defendant or the defendant was apprehended within 120 days from the date of his failure to appear, no judgment or forfeiture of the bond could be entered against the surety, except as provided in subsection (e); finally, in 1993, the General Assembly revised the second sentence of subsection (c) to provide that if the surety caused the apprehension of the defendant or the defendant was apprehended within 120 days from the date of receipt of written notification to the surety of the defendant's failure to appear, no judgment or forfeiture of bond could be entered against the surety, except as provided in subsection (e). *AAA Bail Bond Co. v. State*, 319 Ark. 327, 891 S.W.2d 362 (1995).

Failure to Appear.

When defendant fails to appear at the trial and the court enters that fact upon its record the bond is forfeited. *Craig v. State*, 257 Ark. 112, 514 S.W.2d 383 (1974); *Heritage Ins. Co. v. White County*, 279 Ark. 94, 649 S.W.2d 170 (1983).

Defendants forfeited bond by failing to appear for trial and trial court was not required to set aside the bond forfeiture and to conduct show-cause hearing in the forfeiture because, according to the specific language of this section, it is the surety, or bail bondsman who undertakes the obligation and who is entitled to the order setting the show-cause hearing, not the defendants. *Miranda v. State*, 304 Ark. 567, 803 S.W.2d 910 (1991).

Bond forfeited where bonding company was notified of the date of the defendant's scheduled appearance, but did not advise the defendant, who did not appear; the bond company thus failed to produce the defendant or to submit evidence to the court that part of the bond amount should

be remitted. *M & M Bonding Co. v. State*, 59 Ark. App. 228, 955 S.W.2d 521 (1997).

Court did not err in upholding a bond forfeiture after a person who was arrested for public intoxication did not appear in court; subsection (b) of this section does not provide that the failure of a law enforcement agency to make every reasonable effort to apprehend a person necessarily constitutes good cause for the person's failure to appear. *Hot Springs Bail Bond v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 299 (Apr. 6, 2005).

Forfeiture Upheld.

Forfeiture of the bond for violation of probation and unpaid fines upheld where the surety failed to show that it exercised the effort required to return or attempt to effect the return of the defendant to custody. *AAA Bail Bond Co. v. State*, 55 Ark. App. 35, 929 S.W.2d 723 (1996).

Notice to Surety.

Notice to the surety, before forfeiture, is not required. *Heritage Ins. Co. v. White County*, 279 Ark. 94, 649 S.W.2d 170 (1983).

Substantial compliance with the notice requirement in subsection (c) is not sufficient in view of this section's clear and express requirement that written notification of defendant's nonappearance be given to commence the 120-day period. *AAA Bail Bond Co. v. State*, 319 Ark. 327, 891 S.W.2d 362 (1995).

Where the record failed to reflect notice to the surety within the time limits specified in this section, and forfeiture was entered before a show cause order was issued, reversible error resulted from the State's noncompliance with the terms of this section. *Holt Bonding Co. v. State*, 328 Ark. 178, 942 S.W.2d 834 (1997).

When the trial court performed the operative act of entering the failure of a defendant to appear into the minutes or docket, it became mandatory for notice to be promptly given to the appellant surety; notice given almost 18 months later did not constitute prompt notice. *Bob Cole Bail Bonds, Inc. v. State*, 65 Ark. App. 1, 984 S.W.2d 78 (1999).

The trial court failed to give the form of notice required by this section where the summons issued by the trial court was directed to the surety's street address

rather than the post-office box address stated on the bond. *Bob Cole Bail Bonds, Inc. v. State*, 65 Ark. App. 5, 984 S.W.2d 83 (1999).

The trial court erred in ruling that the service requirements contained in the statute were fulfilled where the record did not show whether the notice was sent to the address listed on the bond and did not reflect that the notice was sent by certified mail. *Bob Cole Bail Bonds, Inc. v. State*, 68 Ark. App. 13, 2 S.W.3d 94 (1999).

No judgment of forfeiture could be entered since the 120-day period never began to run as notice to the surety was defective, and the defendant was apprehended. *Bob Cole Bail Bonds, Inc. v. State*, 68 Ark. App. 13, 2 S.W.3d 94 (1999).

Once the trial court made a docket entry noting defendant's failure to appear, it was mandatory pursuant to subdivision (a)(1)(A) of this section to promptly notify surety of the failure to appear, and failure to do so required reversal of bond forfeiture. *Holt Bonding Co. v. State*, 77 Ark. App. 198, 72 S.W.3d 537 (2002).

Where there was a six-month lapse between defendant's failure to appear and the issuance of the show-cause order, the trial court's failure to give timely notice to the bonding company prevented bond forfeiture. *Spencer Bonding Servs. v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 956 (Dec. 15, 2004).

Recovery of Bail.

Where defendant admitted that he forfeited his bail and he failed to provide any proof that his bail should not have been forfeited because he was in prison at the time of the forfeiture, he could not recover the bail which he had forfeited. *Flynn v. Greene County*, 12 Ark. App. 386, 676 S.W.2d 766 (1984).

Show-Cause Order.

A show-cause order does not abrogate a statutory forfeiture under this section, but merely affords the bondsmen an opportunity to be heard with respect to a total or partial remission of the forfeiture under § 16-84-205. *Craig v. State*, 257 Ark. 112, 514 S.W.2d 383 (1974).

Cited: *General Cas. Co. of Am. v. State*, 229 Ark. 485, 316 S.W.2d 704 (1958); *Central Cas. Co. v. State*, 233 Ark. 832, 349 S.W.2d 135 (1961); *McCrosky v. State*, 235 Ark. 629, 361 S.W.2d 266 (1962); *Flynn v.*

Greene County, 12 Ark. App. 386, 676 S.W.2d 766 (1984); *J & J Bonding, Inc. v. State*, 330 Ark. 599, 955 S.W.2d 516 (1997); *Holt Bonding Co. v. State*, 77 Ark. App. 198, 72 S.W.3d 537 (2002); *Holt Bonding Co. v. State*, 353 Ark. 136, 114 S.W.3d 179 (2003).

16-84-202. Disposition of deposit.

(a) Where money is deposited in lieu of bail with a city official, after the forfeiture and final judgment of the court, the city official shall make settlement with the city treasurer who shall deposit the funds to the credit of the city general fund.

(b) Where money is deposited in lieu of bail with a county official, after the forfeiture and final adjournment of the court, the county official shall make settlement with the county treasurer who shall deposit the funds to the credit of the county general fund.

History. Acts 1989, No. 417, § 5; 1991, No. 720, § 2.

16-84-203. Certain absences excused.

(a) No forfeiture of any appearance or bail bond shall be rendered in any case where a sworn statement of a licensed court-appointed physician is furnished the court showing that the principal in the bond is prevented from attending by some physical or mental disability or where a sworn affidavit of the jailer, warden, or other responsible officer of a jail or correctional facility in which the principal is being detained shall be furnished to the court, or a sworn affidavit of any officer in charge is furnished to the court showing that the principal in the bond is prevented from attending due to the fact that he or she is being detained by a force claiming to act under the authority of the federal government that neither the state nor the surety could control.

(b) The appearance or bail bond shall remain in full force and effect until the principal is physically or mentally able to appear or until a detainer against the principal is filed with the detaining authority.

History. Acts 1989, No. 417, § 5; 2005, No. 1994, § 283. in (a), substituted "correctional facility" for "penitentiary" and inserted "or she."

Amendments. The 2005 amendment,

CASE NOTES

ANALYSIS

Applicability.
Basis of action.
Timeliness.

Applicability.

The summons required by this section is intended to inform those who post bail for others that unless they produce the defendant within 20 days, they will be liable for the defendant's bail; this section does not

apply to defendants who post their own bail. *Flynn v. Greene County*, 12 Ark. App. 386, 676 S.W.2d 766 (1984).

Basis of Action.

In a proceeding against the sureties on a forfeited bail-bond, the bail-bond itself is the basis of the action and must, in connection with the order of forfeiture, present a complete cause of action. *Phillips v. State*, 100 Ark. 515, 140 S.W. 734 (1911).

Timeliness.

Proceedings ordering final judgment against surety in the amount of a bail bond were not prematurely instituted, although brought in the same term of the court as the original order of forfeiture was entered, since the proceedings were instituted after the adjournment of the

session of court at which the original order of forfeiture was entered. *Central Cas. Co. v. State*, 233 Ark. 832, 349 S.W.2d 135 (1961).

Cited: *Central Cas. Co. v. State*, 233 Ark. 832, 349 S.W.2d 135 (1961); *Miranda v. State*, 304 Ark. 567, 803 S.W.2d 910 (1991).

16-84-204 — 16-84-206. [Repealed.]

Publisher's Notes. As to repeal of these sections, see Publisher's Notes at beginning of subchapter.

16-84-207. Action on bail bond in circuit courts.

(a) If a bail bond is granted by a judicial officer, it shall be conditioned on the defendant's appearing for trial, surrendering in execution of the judgment, or appearing at any other time when his or her presence in circuit court may be lawfully required under Rule 9.5 or Rule 9.6 of the Arkansas Rules of Criminal Procedure, or any other rule.

(b)(1) If the defendant fails to appear at any time when the defendant's presence is required under subsection (a) of this section, the circuit court shall enter this fact by written order or docket entry, adjudge the bail bond of the defendant or the money deposited in lieu thereof to be forfeited, and issue a warrant for the arrest of the defendant.

(2) The circuit clerk shall:

(A) Notify the sheriff and each surety on the bail bond that the defendant should be surrendered to the sheriff as required by the terms of the bail bond; and

(B) Immediately issue a summons on each surety on the bail bond requiring the surety to personally appear on the date and time stated in the summons to show cause why judgment should not be rendered for the sum specified in the bail bond on account of the forfeiture.

(c)(1)(A) If the defendant is apprehended and brought before the circuit court within seventy-five (75) days of the date notification is sent under subdivision (b)(2)(A) of this section, then no judgment of forfeiture may be entered against the surety.

(B) The surety shall be liable for the cost of returning the defendant to the circuit court in an amount not to exceed the face amount of the bond.

(2)(A) If the defendant is apprehended and brought before the circuit court after the seventy-five-day period under subdivision (c)(1) of this section, the circuit court may exonerate the amount of the surety's liability under the bail bond as the circuit court determines in its discretion and, if the surety does not object, enter judgment accordingly against the surety.

(B) In determining the extent of liability of the surety on the bond, the circuit court may take into consideration the actions taken and

the expenses incurred by the surety to locate the defendant, the expenses incurred by law enforcement officers to locate and return the defendant, and any other factors the circuit court finds relevant.

(3) The appropriate law enforcement agencies shall make every reasonable effort to apprehend the defendant.

(d)(1) If the surety does not consent to the entry of judgment in the amount determined under subsection (c) of this section, or if the defendant has not surrendered or been brought into custody, then at the time of the show cause hearing unless continued to a subsequent time, the circuit court shall determine the surety's liability and enter judgment on the forfeited bond.

(2) The circuit court may exercise its discretion in determining the amount of the judgment and may consider the factors listed in subsection (c) of this section.

(e)(1) No pleading on the part of the state shall be required in order to enforce a bond under this section.

(2) The summons required under subsection (b) of this section shall be made returnable and shall be executed as in civil actions, and the action shall be docketed and shall proceed as an ordinary civil action.

(3) The summons may be directed to and served on an agent of the surety, and the surety's appearance pursuant to the summons shall be in person and not by filing an answer or other pleading.

(f) Notwithstanding any law to the contrary, a circuit court may suspend a bail bond company's or agent's ability to issue bail bonds in its court if the bail bond company or agent fails to comply with an order of the circuit court or fails to pay forfeited bonds in accordance with a circuit court's order.

History. Acts 2003, No. 752, § 1; 2003, No. 1472, § 1.

A.C.R.C. Notes. References to "this

chapter" in §§ 16-84-201 — 16-84-206 and subchapter 1 may not apply to this section which was enacted subsequently.

CHAPTER 85

PRETRIAL PROCEEDINGS

SUBCHAPTER

1. GENERAL PROVISIONS.
2. PRELIMINARY EXAMINATION.
3. INFORMATION AND BILL OF PARTICULARS.
4. INDICTMENT GENERALLY.
5. GRAND JURY PROCEEDINGS.
6. PROCESS ON INDICTMENT.
7. ARRAIGNMENT AND PLEADING GENERALLY.

Publisher's Notes. Some provisions of this chapter may be superseded by the Arkansas Rules of Criminal Procedure, which became effective January 1, 1976.

RESEARCH REFERENCES

Ark. L. Rev. Criminal Procedure: A Survey of Arkansas Law and the American Bar Association's Standards, 26 Ark. L. Rev. 169.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

16-85-101. Right to attorney, physician, and phone calls.

SECTION.

16-85-102. [Repealed.]

Effective Dates. Acts 1937, No. 306, § 4: effective on passage.

16-85-101. Right to attorney, physician, and phone calls.

(a) While confined and awaiting trial in any prison or jail in this state, no prisoner shall be denied the right to:

(1) Consult an attorney of the prisoner's own choosing;

(2) Call a physician of the prisoner's own choosing if in need of one; or

(3) Place free telephone calls to a bondsperson if the calls are local calls.

(b) Any officer or other person having charge or supervision of any prisoner in the state who refuses to permit the prisoner to consult an attorney of the prisoner's own choosing, call a physician of the prisoner's own choosing, or place free telephone calls to a bondsperson if the calls are local shall be guilty of a Class B misdemeanor.

History. Acts 1937, No. 306, §§ 2, 3; Pope's Dig., §§ 3043, 3044; A.S.A. 1947, §§ 43-417.1, 43-417.2; Acts 2001, No. 1682, § 1; 2003, No. 1648, § 2; 2005, No. 1994, § 236.

Amendments. The 2001 amendment redesignated former (a) as present (a)(1)-(3) and made related changes; added "While confined ... awaiting trial, no" in (a); rewrote present (a)(3); inserted "or to place free ... local calls" in (b); and made

minor stylistic and gender neutral changes throughout.

The 2003 amendment inserted "or jail" in (a).

The 2005 amendment, in (b), inserted "Class B" and deleted "and shall be fined in any sum not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) and may be confined to prison for not more than ninety (90) days" from then end.

CASE NOTES

ANALYSIS

No right to attorney.
Request for physical examination.

No Right to Attorney.

Defendant could not be characterized as

a prisoner confined to prison awaiting trial by virtue of his driving while intoxicated arrest; he further did not have the right to counsel before taking the breathalyzer test. *Hudgens v. State*, 324 Ark. 169, 919 S.W.2d 939 (1996).

Request for Physical Examination.

Defendant's application that he be permitted to have his person examined by a competent physician and to have a photograph taken for the purpose of showing cruel treatment by officer in order to ob-

tain confession was improperly denied, and, since examination could not be made following appeal, defendant should have been permitted to show that he requested the examination. *Morton v. State*, 207 Ark. 704, 182 S.W.2d 675 (1944).

16-85-102. [Repealed.]

Publisher's Notes. This section, concerning corporal or physical punishment, was repealed by Acts 2005, No. 1994,

§ 526. The section was derived from Acts 1937, No. 306, § 3; Pope's Dig., § 3044; A.S.A. 1947, § 43-417.2.

SUBCHAPTER 2 — PRELIMINARY EXAMINATION

SECTION.

16-85-201 — 16-85-212. [Repealed.]

16-85-201 — 16-85-212. [Repealed.]

Publisher's Notes. This subchapter was repealed by Acts 2005, No. 1994, § 502. The subchapter was derived from the following sources:

16-85-201. Crim. Code, §§ 43-45; C. & M. Dig., §§ 2913-2915; Pope's Dig., §§ 3729-3731; A.S.A. 1947, §§ 43-601 — 43-603.

16-85-202. Crim. Code, § 46; C. & M. Dig., § 2917; Pope's Dig., § 3733; A.S.A. 1947, § 43-604.

16-85-203. Crim. Code, § 47; C. & M. Dig., § 2918; Pope's Dig., § 3734; A.S.A. 1947, § 43-605.

16-85-204. Crim. Code, § 56; C. & M. Dig., § 2928; Pope's Dig., § 3744; A.S.A. 1947, § 43-615.

16-85-205. Crim. Code, §§ 48, 54, 55, 57; Acts 1915, No. 240, § 1; C. & M. Dig., §§ 2919-2921, 2929, 2930; Pope's Dig., §§ 3735-3737, 3745, 3746; A.S.A. 1947, §§ 43-606 — 43-608, 43-616, 43-617.

16-85-206. Crim. Code, §§ 49-53, 65;

Acts 1877, No. 8, § 1, p. 6; C. & M. Dig., §§ 2922-2927; Pope's Dig., §§ 3738-3743; A.S.A. 1947, §§ 43-609 — 43-614.

16-85-207. Crim. Code, §§ 58-60, 66; Acts 1871, No. 49, § 1 [66], p. 255; C. & M. Dig., §§ 2931-2934, 2937; Pope's Dig., §§ 3747-3750, 3754; A.S.A. 1947, §§ 43-618 — 43-622.

16-85-208. Crim. Code, §§ 62, 64; Acts 1875, No. 77, § 34, p. 167; C. & M. Dig., §§ 2935, 2936, 4601; Pope's Dig., §§ 3751, 3752, 5690; A.S.A. 1947, §§ 43-623 — 43-625.

16-85-209. Crim. Code, § 63; C. & M. Dig., § 2939; Pope's Dig., § 3755; A.S.A. 1947, § 43-631.

16-85-210. Init. Meas. 1936, No. 3, §§ 1, 2; Acts 1937, p. 1384; Pope's Dig., § 3753; A.S.A. 1947, §§ 43-626, 43-627.

16-85-211. Acts 1907, No. 379, §§ 1-3, p. 958; C. & M. Dig., §§ 2940-2942; Pope's Dig., §§ 3756-3758; A.S.A. 1947, §§ 43-628 — 43-630.

16-85-212. Acts 1993, No. 961, § 3.

SUBCHAPTER 3 — INFORMATION AND BILL OF PARTICULARS

SECTION.

16-85-301. Bill of particulars.

16-85-302. Information.

Effective Dates. Acts 1937, No. 160, § 7: approved Mar. 1, 1937. Emergency clause provided: "It is found to be a fact that the less frequent meetings of the

grand jury necessitates vesting authority in the prosecuting attorney to subpoena witnesses in order to properly prepare criminal cases. Therefore, this Act being

necessary for the public health, peace and safety, an emergency is declared to exist,

and this Act shall become effective immediately upon its passage."

RESEARCH REFERENCES

ALR. Finding or return of indictment, or filing of information, as tolling limitation period. 18 ALR 4th 1202.

Speedy trial statute: application to dismissal or other termination of prior indictment or information and bringing of new indictment or information. 39 ALR 4th 899.

Limitations on state prosecuting attorney's discretion to initiate prosecution by indictment or information. 44 ALR 4th 401.

Am. Jur. 41 Am Jur. 2d, Indict., § 1 et seq.

C.J.S. 42 C.J.S., Indict., § 1 et seq.

16-85-301. Bill of particulars.

(a) The bill of particulars required by law in criminal cases shall state the action relied upon by the state in sufficient detail as required by an indictment prior to March 1, 1937, that is, with sufficient certainty to apprise the defendant of the specific crime with which charged, in order to enable him or her to prepare his or her defense.

(b) A supplemental bill of particulars may be required upon order of the trial court if the bill of particulars filed by the prosecuting attorney is not sufficiently definite to apprise the defendant of the specific crime with which he or she is charged.

(c) When a bill of particulars is filed with the clerk, a copy of it shall be furnished to the defendant upon his or her request.

History. Acts 1937, No. 160, §§ 4, 5; Pope's Dig., §§ 3796, 3797; A.S.A. 1947, §§ 43-804, 43-805.

CASE NOTES

ANALYSIS

Purpose.
Discovery.
Discretion of court.
Noncompliance.
Sufficiency.
Supplemental bill.

Purpose.

The purpose of a bill of particulars is to acquaint the defense with sufficient information so that a defense can be prepared. *Edens v. State*, 235 Ark. 996, 363 S.W.2d 923 (1963); *Limber v. State*, 264 Ark. 479, 572 S.W.2d 402 (1978); *David v. State*, 295 Ark. 131, 748 S.W.2d 117 (1988); *Nance v. State*, 323 Ark. 583, 918 S.W.2d 114 (1996), cert. denied, 519 U.S. 847, 117 S. Ct. 134, 136 L. Ed. 2d 83 (1996).

Discovery.

Defendant in a criminal proceeding may not use a motion denominated as a motion for a bill of particulars as a discovery vehicle. *Edens v. State*, 235 Ark. 996, 363 S.W.2d 923 (1963).

In the absence of prejudice, there is no error in failing to supply a bill of particulars when complete discovery has been granted. *Limber v. State*, 264 Ark. 479, 572 S.W.2d 402 (1978).

Discretion of Court.

The trial court, using discretion, can grant or deny the request for a bill of particulars. *Burnett v. State*, 287 Ark. 158, 697 S.W.2d 95 (1985).

Noncompliance.

Where the prosecutor failed to comply

properly with defendant's discovery motion requesting names of all state witnesses and also improperly withheld the details of the alleged crime which should have been set out in the state's bill of particulars, defendant's conviction was reversed. *Masingill v. State*, 7 Ark. App. 90, 644 S.W.2d 614 (1983).

Sufficiency.

Indictment or information held to be sufficiently specific that bill of particulars not required. *Perkins v. State*, 217 Ark. 252, 230 S.W.2d 1 (1950); *Willis v. State*, 221 Ark. 162, 252 S.W.2d 618 (1952); *Silas v. State*, 232 Ark. 248, 337 S.W.2d 644 (1960), cert. denied, 365 U.S. 821, 81 S. Ct. 705, 5 L. Ed. 2d 698 (1961); *Nance v. State*, 323 Ark. 583, 918 S.W.2d 114 (1996).

Information in conjunction with bill held sufficient. *Lee v. State*, 229 Ark. 354, 315 S.W.2d 916 (1958), cert. denied, 359 U.S. 930, 79 S. Ct. 616, 3 L. Ed. 2d 633 (1959).

Supplemental Bill.

If, in prosecution on charge of obtaining money under false pretenses, the defendant filed a motion for a bill of particulars which was not definite and full, the defendant had the right to require the filing of a supplemental bill of particulars. *Mortensen v. State*, 214 Ark. 528, 217 S.W.2d 325 (1949).

The defense may request that the state provide more details of the crime in a bill of particulars, and if defendant is not satisfied, he can seek a supplemental bill of particulars. *David v. State*, 295 Ark. 131, 748 S.W.2d 117 (1988).

Cited: *Haller v. State*, 217 Ark. 646, 232 S.W.2d 829 (1950); *Ragsdale v. State*, 222 Ark. 499, 262 S.W.2d 91 (1953); *Powell v. State*, 251 Ark. 46, 471 S.W.2d 333 (1971), cert. denied, 406 U.S. 917, 92 S. Ct. 1763, 32 L. Ed. 2d 115 (1972); *Caton v. State*, 252 Ark. 420, 479 S.W.2d 537 (1972); *Flaherty v. State*, 255 Ark. 187, 500 S.W.2d 87 (1973), cert. denied, 415 U.S. 995, 94 S. Ct. 1599, 39 L. Ed. 2d 893 (1974).

16-85-302. Information.

Whenever a defendant has been held to answer at a preliminary examination to await the action of the grand jury or has been held for the circuit court, the prosecuting attorney may proceed to file information in the circuit court and to trial of the case, provided the prosecuting attorney, with the consent of the circuit court, may nolle prosequi any indictment or information pending in the court.

History. Acts 1937, No. 160, § 6; Pope's Dig., § 3798; A.S.A. 1947, § 43-806.

RESEARCH REFERENCES

Ark. L. Notes. Malone, The Availability of a First Appearance and Preliminary Hearing, 1983 Ark. L. Notes 41.

CASE NOTES

ANALYSIS

Constitutionality.
Alternative methods.
Nolle prosequi.
Oath.

Sufficiency.
Time of filing.

Constitutionality.

Information by prosecuting attorney was not in violation of the due process

clause of U.S. Constitution. *Deatherage v. State*, 194 Ark. 513, 108 S.W.2d 904 (1937).

Alternative Methods.

Prosecution for an offense may be by information or grand jury indictment. *Smith v. State*, 194 Ark. 1041, 110 S.W.2d 24 (1937); *Rowland v. State*, 213 Ark. 780, 213 S.W.2d 370, cert. denied, 336 U.S. 918, 69 S. Ct. 641, 93 L. Ed. 1081 (1949); *Ellingburg v. State*, 254 Ark. 199, 492 S.W.2d 904 (1973).

Nolle Prosequi.

The trial court has no power to enter a nolle prosequi over the objection of the prosecuting attorney and neither the trial court nor the appellate court may compel a nolle prosequi, though they may suggest it. *Hammers v. State*, 261 Ark. 585, 550 S.W.2d 432 (1977).

The trial judge is vested with discretion as to the entry of a nolle prosequi of charges pending before him. *Noland v. State*, 265 Ark. 764, 580 S.W.2d 953 (1979).

Oath.

Neither the constitution nor the statutes require that an information be under oath. *Bazzell v. State*, 222 Ark. 473, 261 S.W.2d 541 (1953).

Sufficiency.

Although an information is drawn in the language of a particular section of the statute and that section does not apply, if by reasonable construction the language of the information charges an offense against the laws of the state under any other provision of the statutes, the proceedings should not be nullified. *Baker v. State*, 200 Ark. 688, 140 S.W.2d 1008 (1940).

This section does not require that an information be accompanied by an affidavit. *Jacobs v. State*, 317 Ark. 454, 878 S.W.2d 734 (1994); *Nance v. State*, 323 Ark. 583, 918 S.W.2d 114 (1996).

Time of Filing.

An information may be filed before preliminary examination of the accused. *Payne v. State*, 226 Ark. 910, 295 S.W.2d 312 (1956), rev'd on other grounds, 356 U.S. 560, 78 S. Ct. 844, 2 L. Ed. 2d 975 (1959).

Cited: *Keating v. State*, 255 Ark. 638, 501 S.W.2d 607 (1973); *Dyas v. State*, 260 Ark. 303, 539 S.W.2d 251 (1976); *Ginter v. Stallcup*, 641 F. Supp. 939 (E.D. Ark. 1986); *Ginter v. Stallcup*, 869 F.2d 384 (8th Cir. 1989).

SUBCHAPTER 4 — INDICTMENT GENERALLY

SECTION.

- 16-85-401. Definition.
- 16-85-402. Finding of indictment by jurors.
- 16-85-403. Contents.
- 16-85-404. [Repealed.]
- 16-85-405. Sufficiency and errors.
- 16-85-406. Construction of words.

SECTION.

- 16-85-407. Amendment of indictment and filing of bill of particulars.
- 16-85-408. Public inspection and disclosure.
- 16-85-409. Recording.
- 16-85-410. [Repealed.]

Cross References. Decision in impeachment trial brought in senate no bar to indictment, § 21-12-208.

Punishment for contempt no bar to indictment, § 16-10-108.

Effective Dates. Acts 1881, No. 58, § 3: effective on passage.

Acts 1901, No. 11, § 2: effective on passage.

Acts 1921, No. 230, § 2: Mar. 4, 1921. Emergency declared.

RESEARCH REFERENCES

ALR. Validity of indictment as affected by substitution or addition of grand jurors after commencement of investigation. 2 ALR 4th 980.

Finding or return of indictment, or filing of information, as tolling limitation period. 18 ALR 4th 1202.

Failure to swear or irregularity in swearing witnesses appearing before grand jury as ground for dismissal of indictment. 23 ALR 4th 154.

Unauthorized persons: presence during state grand jury proceedings as affecting indictment. 23 ALR 4th 397.

Speedy trial statute: application to dismissal or other termination of prior indictment or information and bringing of new indictment or information. 39 ALR 4th 899.

Limitations on state prosecuting attorney's discretion to initiate prosecution by indictment or information. 44 ALR 4th 401.

Am. Jur. 41 Am. Jur. 2d, Indict., § 1 et seq.

C.J.S. 42 C.J.S., Indict., § 1 et seq.

16-85-401. Definition.

As used in this code, unless the context otherwise requires, an "indictment" is an accusation in writing, found and presented by a grand jury to the court in which they are impaneled, charging a person with the commission of a public offense.

History. Crim. Code, § 117; C. & M. Dig., § 3007; Pope's Dig., § 3829; A.S.A. 1947, § 43-1001.

Publisher's Notes. "This code," re-

ferred to in this section, means the Code of Practice in Criminal Cases of 1869. See parallel reference tables in the tables volume.

CASE NOTES

Cited: Rowland v. State, 213 Ark. 780, 213 S.W.2d 370 (1948).

16-85-402. Finding of indictment by jurors.

(a) The concurrence of twelve (12) grand jurors is required to find an indictment.

(b) When so found, it must be endorsed "a true bill" and the endorsement signed by the foreman.

(c) When an indictment is found, the names of all witnesses who were examined must be written at the foot of or on the indictment.

(d) The indictment must:

(1) Be presented by the foreman of the grand jury to the court; and

(2)(A) Be filed with the clerk; and

(B) Remain in his or her office as a public record.

History. Crim. Code, §§ 118-120; C. & M. Dig., §§ 3008-3011; Pope's Dig., §§ 3830-3833; A.S.A. 1947, §§ 43-1002 — 43-1005.

CASE NOTES

ANALYSIS

Construction.
Endorsement.
Names of witnesses.
Number of jurors.
Presentment and filing.
Record.

Construction.

Subsection (c) is merely directory. *State v. Agnew*, 52 Ark. 275, 12 S.W. 563 (1889); *Cole v. State*, 156 Ark. 9, 245 S.W. 303 (1922); *McGuffin v. State*, 156 Ark. 392, 246 S.W. 478 (1923); *Wood v. State*, 157 Ark. 503, 248 S.W. 568 (1923); *Thomas v. State*, 161 Ark. 644, 257 S.W. 376 (1924); *Taylor v. State*, 186 Ark. 162, 52 S.W.2d 961 (1932); *Baker v. State*, 215 Ark. 851, 223 S.W.2d 809 (1949); *Steel v. State*, 246 Ark. 75, 436 S.W.2d 800 (1969).

Endorsement.

Objection to omission of foreman's endorsement will be waived unless objection is made before pleading. *State v. Agnew*, 52 Ark. 275, 12 S.W. 563 (1889).

An endorsement leaving the date blank is sufficient to show a return by the grand jury. *Shinn v. State*, 93 Ark. 290, 124 S.W. 263 (1910).

Indictment was not defective because the foreman endorsed his name above the words "a true bill." *Withem v. State*, 175 Ark. 453, 299 S.W. 739 (1927). See also *Taylor v. State*, 169 Ark. 589, 276 S.W. 577 (1925).

Names of Witnesses.

Omission to endorse on an indictment the names of witnesses examined before the jury is not ground for setting aside the indictment. *State v. Brandon*, 28 Ark. 410 (1873); *State v. Johnson*, 33 Ark. 174 (1878); *Baker v. State*, 215 Ark. 851, 223 S.W.2d 809 (1949).

Number of Jurors.

The testimony of the grand jurors who presented an indictment is not admissible to show that only 11 of their number voted in favor of finding a true bill. *Nash v. State*, 73 Ark. 399, 84 S.W. 497 (1904);

Nash v. State, 79 Ark. 120, 95 S.W. 147 (1906).

It will be presumed that the indictment was found by the requisite number. *Cook v. State*, 109 Ark. 384, 160 S.W. 223 (1913).

When an indictment is properly returned into court, it will be presumed that it was duly found with the concurrence of the requisite number of the grand jury. *Saint Louis, I.M. & S. Ry. v. State*, 99 Ark. 1, 136 S.W. 938 (1911); *Cook v. State*, 109 Ark. 384, 160 S.W. 223 (1913).

Presentment and Filing.

The record must show that the indictment was brought into court. The endorsement of the clerk upon the indictment, "filed in open court," is not sufficient. *McKenzie v. State*, 24 Ark. 636 (1867); *Holcomb v. State*, 31 Ark. 427 (1876); *Chandler v. State*, 38 Ark. 197 (1881); *West v. State*, 71 Ark. 144, 71 S.W. 483 (1903); *Shinn v. State*, 93 Ark. 290, 124 S.W. 263 (1910).

The indictment must be presented by the foreman in the presence of the grand jury. *Robinson v. State*, 33 Ark. 180 (1878).

It is sufficient for the clerk to describe the indictment by number when the party indicted is not in custody. *Fitzpatrick v. State*, 37 Ark. 238 (1881).

In felony cases, a nunc pro tunc order cannot be made in the defendant's absence. *Felker v. State*, 54 Ark. 489, 16 S.W. 663 (1891).

The objection that an indictment failed to show that it was filed in open court in the presence of the grand jury can only be reached by a motion to quash the indictment. *Berry v. State*, 155 Ark. 29, 243 S.W. 858 (1922).

Record.

The omission in the record may be supplied by a nunc pro tunc entry. *State v. Gowen*, 12 Ark. 62 (1851); *Green v. State*, 19 Ark. 178 (1857); *James v. State*, 41 Ark. 451 (1883).

Cited: *Steel v. State*, 246 Ark. 75, 436 S.W.2d 800 (1969); *Lomax v. State*, 248 Ark. 534, 452 S.W.2d 646 (1970).

16-85-403. Contents.

(a)(1) The language of the indictment must be certain as to the title of the prosecution, the name of the court in which the indictment is presented, and the name of the parties.

(2) Upon request of the defendant, the state shall file a bill of particulars setting out the act or acts upon which it relies for conviction.

(b) An indictment may be substantially in the following form:

"The State of Arkansas,

vs. _____ In the Pulaski Circuit Court.

John Doe.

The grand jury of Pulaski County, in the name and by the authority of the State of Arkansas, accuse John Doe of the crime of murder in the first degree (or other crime, as the case may be), committed as follows: The said John Doe, on January 1, 1936, in Pulaski County, did murder Richard Roe, against the peace and dignity of the State of Arkansas."

(c) The indictment must be direct and certain as regards:

(1) The party charged;

(2) The offense or offenses charged;

(3) The county in which the offense or offenses were committed; and

(4) The particular circumstances of the offense or offenses charged where they are necessary to constitute a complete offense or offenses.

History. Crim. Code, §§ 121-123; C. & M. Dig., §§ 3012, 3028, 3029; Init. Meas. 1936, No. 3, §§ 22, 23, Acts 1937, p 1384; Pope's Dig., §§ 3834, 3851, 3852; A.S.A. 1947, §§ 43-1006 — 43-1008; Acts 2005, No. 1994, § 317.

Amendments. The 2005 amendment

redesignated former (a) as present (a)(1); deleted former (a)(1) and (a)(2) and redesignated former (a)(3) as present (a)(2); and inserted "or offenses" in (c)(2), (3) and (4).

Cross References. Style of indictments, Ark. Const., Art. 7, § 49.

CASE NOTES

ANALYSIS

In general.

Bill of particulars.

County.

Criminal intent.

Form.

Offense charged.

Sufficiency.

Title.

In General.

For cases discussing this section as it existed prior to the 1936 amendment, which rewrote the section, see *Brittin v. State*, 10 Ark. 299 (1850); *Moffatt v. State*, 11 Ark. 169 (1850); *State v. Adams*, 16 Ark. 497 (1855); *Lemon v. State*, 19 Ark. 171 (1857); *Guest v. State*, 19 Ark. 405 (1858); *State v. Collins*, 19 Ark. 587 (1858); *Roberts v. State*, 21 Ark. 183 (1860); *Thompson v. State*, 26 Ark. 323 (1870); *Edwards*

v. State, 27 Ark. 493 (1872); *Barton v. State*, 29 Ark. 68 (1874); *Dixon v. State*, 29 Ark. 165 (1874); *McPherson v. State*, 29 Ark. 225 (1874); *Lacefield v. State*, 34 Ark. 275 (1879); *Johnson v. State*, 36 Ark. 242 (1880); *State v. Graham*, 38 Ark. 519 (1882); *State v. Springer*, 43 Ark. 91 (1884); *Shotwell v. State*, 43 Ark. 345 (1884); *Farmer v. State*, 45 Ark. 95 (1885); *Glass v. State*, 45 Ark. 173 (1885); *State v. Reed*, 45 Ark. 333 (1885); *State v. Frederick*, 45 Ark. 347 (1885); *Fortenbury v. State*, 47 Ark. 188, 1 S.W. 58 (1886); *State v. Withrow*, 47 Ark. 551, 2 S.W. 184 (1886); *State v. Kansas City S. & M.R.R.*, 54 Ark. 546, 16 S.W. 567 (1891); *Cleary v. State*, 56 Ark. 124, 19 S.W. 313 (1892); *La Rue v. State*, 64 Ark. 144, 41 S.W. 53 (1897); *Adams v. State*, 64 Ark. 188, 41 S.W. 423 (1897); *State v. Crawford*, 64 Ark. 194, 41 S.W. 425 (1897); *Keoun v. State*, 64 Ark.

231, 41 S.W. 808 (1897); *State v. Boyce*, 65 Ark. 82, 44 S.W. 1043 (1898); *Inman v. State*, 65 Ark. 508, 47 S.W. 558 (1898); *Boorman v. State*, 66 Ark. 65, 48 S.W. 899 (1898); *Houston v. State*, 66 Ark. 120, 49 S.W. 351 (1899); *Hampton v. State*, 67 Ark. 266, 54 S.W. 746 (1899); *State v. Mullins*, 67 Ark. 422, 55 S.W. 211 (1900); *State v. Williams*, 68 Ark. 241, 57 S.W. 792 (1900); *Saint Louis & S.F. Ry. v. State*, 68 Ark. 251, 57 S.W. 796 (1900); *Keeton v. State*, 70 Ark. 163, 66 S.W. 645 (1902); *State v. Culbreath*, 71 Ark. 80, 71 S.W. 254 (1902); *Green v. State*, 71 Ark. 150, 71 S.W. 665 (1903); *Carroll v. State*, 71 Ark. 403, 75 S.W. 471 (1903); *Halliburton v. State*, 71 Ark. 474, 75 S.W. 929 (1903); *State v. Ring*, 77 Ark. 139, 91 S.W. 11 (1905); *Richardson v. State*, 77 Ark. 321, 91 S.W. 758 (1905); *Sherrill v. State*, 84 Ark. 470, 106 S.W. 967 (1907); *Larimore v. State*, 84 Ark. 606, 107 S.W. 165 (1907); *Franklin v. State*, 85 Ark. 534, 109 S.W. 298 (1908); *Henderson v. State*, 91 Ark. 224, 120 S.W. 966 (1909); *Williams v. State*, 93 Ark. 81, 123 S.W. 780 (1909); *St. Louis, I.M. & S. Ry. v. State*, 90 Ark. 609, 128 S.W. 1199 (1909); *Harding v. State*, 94 Ark. 65, 126 S.W. 90 (1910); *State v. Lester*, 94 Ark. 242, 126 S.W. 846 (1910); *Pearce v. State*, 97 Ark. 5, 132 S.W. 986 (1910); *Parker v. State*, 98 Ark. 575, 137 S.W. 253 (1911); *Petty v. State*, 102 Ark. 170, 143 S.W. 1067 (1912); *Fox v. State*, 102 Ark. 393, 144 S.W. 516 (1912); *Ray v. State*, 102 Ark. 594, 145 S.W. 881 (1912); *Kreider v. State*, 103 Ark. 438, 147 S.W. 449 (1912); *Wolfe v. State*, 107 Ark. 33, 153 S.W. 1102 (1913); *Halley v. State*, 108 Ark. 224, 158 S.W. 121 (1913); *Hughes v. State*, 109 Ark. 403, 160 S.W. 209 (1913); *Holland v. State*, 111 Ark. 214, 163 S.W. 781 (1914); *State v. Bunch*, 119 Ark. 219, 177 S.W. 932 (1915); *State v. Haller*, 119 Ark. 503, 177 S.W. 1138 (1915); *State v. Seawood*, 123 Ark. 565, 186 S.W. 72 (1916); *McNeil v. State*, 125 Ark. 47, 187 S.W. 1060 (1916); *State v. Bond*, 151 Ark. 203, 235 S.W. 801 (1921); *State v. Mason*, 155 Ark. 189, 244 S.W. 6 (1922); *Dooms v. State*, 164 Ark. 50, 260 S.W. 708 (1924); *Spears v. State*, 173 Ark. 1071, 294 S.W. 66 (1927); *Harrell v. State*, 177 Ark. 505, 7 S.W.2d 23 (1928); *Calhoun v. State*, 180 Ark. 397, 21 S.W.2d 606 (1929); *Bramlett v. State*, 184 Ark. 808, 43 S.W.2d 364 (1931); *Green v. State*, 185 Ark. 1098, 51 S.W.2d 511 (1932); *Kansas City S. Ry. v. State*, 194 Ark. 80, 106 S.W.2d 163 (1937);

Tucker v. State, 194 Ark. 528, 108 S.W.2d 890 (1937).

The requirements for informations and indictments are set out in this section and Ark. Const., Art. 7, § 49. *Archer v. Benton County Circuit Court*, 316 Ark. 477, 872 S.W.2d 397 (1994).

Bill of Particulars.

Denial of request for bill of particulars was held not error where information filed set out in detail the acts upon which the state relied for a conviction and contained all requirements of former statute to make a good indictment had it been returned by a grand jury. *Brockelhurst v. State*, 195 Ark. 67, 111 S.W.2d 527 (1937).

Allegations of information or indictment held sufficient in the absence of motion for a bill of particulars. *Craig v. State*, 195 Ark. 925, 114 S.W.2d 1073 (1938); *Jackson v. State*, 226 Ark. 731, 293 S.W.2d 699 (1956).

If defendant desires details more specific than those set out in the information, he can file a motion for a bill of particulars. *Smith v. State*, 231 Ark. 235, 330 S.W.2d 58 (1959); *Parker v. State*, 265 Ark. 315, 578 S.W.2d 206 (1979); *David v. State*, 295 Ark. 131, 748 S.W.2d 117 (1988).

In a trial on an indictment for murder, it was not necessary for the defendant to request a bill of particulars in order to be entitled to an instruction on the degrees of homicide where the state elected from the start to charge him with premeditated murder rather than murder in the commission of a felony. *Bosnick v. State*, 248 Ark. 846, 455 S.W.2d 311 (1970).

Where request for a bill of particulars was specifically made by defendants it was prejudicial error to fail to furnish them with a bill of particulars. *Bliss v. State*, 282 Ark. 315, 668 S.W.2d 936 (1984).

The prosecuting attorney did not commit reversible error by failing to file a bill of particulars stating what act the state would rely upon at trial to prove the crime, where the information set out in detail the act upon which the state would rely for a conviction and contained all of the necessary requirements and the defendant failed to demonstrate how he was prejudiced by the state's technical failure to file a formal answer to the defendant's motion for a bill of particulars. *Speer v.*

State, 18 Ark. App. 1, 708 S.W.2d 94 (1986).

Trial court has some discretion under this section in granting motions for a bill of particulars. *Cope v. State*, 292 Ark. 391, 730 S.W.2d 242 (1987).

County.

Erroneous allegation of county wherein offense was committed where accused was tried in county in which the testimony showed the offense was committed was not prejudicial. *Meador v. State*, 201 Ark. 1083, 148 S.W.2d 653 (1941).

Criminal Intent.

In a prosecution for murder, it is not necessary to allege and prove "premeditation" where the indictment charges that the crime was committed while attempting robbery. *Noble v. State*, 195 Ark. 453, 112 S.W.2d 631 (1938).

Allegations in bribery indictment were sufficient as in accord with the statute, though no allegation was made that city attorney received the bribes with that intent that bribes would influence his decisions. *Rowland v. State*, 213 Ark. 780, 213 S.W.2d 370 (1948), cert. denied, 336 U.S. 918, 69 S. Ct. 641, 93 L. Ed. 1081.

Form.

Subsection (b) of this section is applicable to charging any crime other than that of murder. *Baker v. State*, 199 Ark. 1005, 137 S.W.2d 938, cert. denied, 311 U.S. 666, 61 S. Ct. 25 (1940).

Form of information charging first degree murder held sufficient. *Thompson v. State*, 205 Ark. 1040, 172 S.W.2d 234 (1943).

In a trial for murder on an indictment in the form prescribed in this section, in which the state elected to charge the defendant with premeditated murder rather than murder in the commission of a felony, it was error to refuse an instruction on the degrees of homicide. *Bosnick v. State*, 248 Ark. 846, 455 S.W.2d 311 (1970).

Indictment clearly appraised defendant of the crime charged and amendment of the indictment to add certain words was simply a matter of form, which did nothing to change the nature of the crime otherwise charged. *Owen v. State*, 263 Ark. 493, 565 S.W.2d 607 (1978).

Offense Charged.

Although an information is drawn in the language of a particular section of the

statute and that section is not applicable, if, by reasonable construction, the language of the information charges an offense against the laws of the state under another provision of the statutes, the proceeding should not be nullified. *Baker v. State*, 200 Ark. 688, 140 S.W.2d 1008 (1940).

Where defendant tried for first degree murder was found guilty of second degree murder, he was in no position to complain that the information charged elements that would not support first degree murder but only second degree murder. *Brewer v. State*, 251 Ark. 7, 470 S.W.2d 581 (1971).

It was not necessary for the information to include a statement of the act constituting the offense where the only crime charged was assault with the intent to kill. *Ridgeway v. State*, 251 Ark. 157, 472 S.W.2d 108 (1971).

Accused may be convicted of lesser offense, under proper instructions when charged with the greater offense, but he cannot be convicted of a felony when only charged with a misdemeanor. *Scoggins v. State*, 258 Ark. 749, 528 S.W.2d 641 (1975).

Indictment for conspiracy to obtain money by false pretenses need not include statement of acts constituting offense. *Owen v. State*, 263 Ark. 493, 565 S.W.2d 607 (1978).

This section does not require that the penalty of the alleged offense be included in the information. *Workman v. State*, 267 Ark. 103, 589 S.W.2d 20 (1979).

It is only necessary that the indictment name the offense and the party to be charged; the state is not required to include a statement of the act or acts constituting the offense, unless the offense cannot be charged without doing so. *David v. State*, 295 Ark. 131, 748 S.W.2d 117 (1988).

Sufficiency.

Information or indictment held sufficient. *Johnson v. State*, 199 Ark. 196, 133 S.W.2d 15 (1939); *Robbins v. State*, 219 Ark. 376, 242 S.W.2d 640 (1951); *Castle v. State*, 229 Ark. 478, 316 S.W.2d 701 (1958); *Smith v. State*, 231 Ark. 235, 330 S.W.2d 58 (1959); *England v. State*, 234 Ark. 421, 352 S.W.2d 582 (1962); *Snider v. State*, 242 Ark. 728, 415 S.W.2d 53 (1967); *Estes v. State*, 246 Ark. 1145, 442 S.W.2d

221 (1969); *Haupt v. State*, 249 Ark. 485, 459 S.W.2d 565 (1970); *Williford v. State*, 252 Ark. 397, 479 S.W.2d 244 (1972); *Henderson v. State*, 255 Ark. 870, 503 S.W.2d 889 (1974); *Haynie v. State*, 257 Ark. 542, 518 S.W.2d 492 (1975); *Fortner v. State*, 258 Ark. 591, 528 S.W.2d 378 (1975); *Beard v. State*, 269 Ark. 16, 598 S.W.2d 72 (1980); *Browning v. State*, 274 Ark. 13, 621 S.W.2d 688 (1981); *Drew v. State*, 8 Ark. App. 120, 648 S.W.2d 836 (1983).

Title.

The word "title" as used in this section, relates to the authority under which the proceeding is brought and not to ownership of property alleged to have been stolen. *Mitchell v. State*, 205 Ark. 596, 169 S.W.2d 867 (1943).

Cited: *Budd v. State*, 198 Ark. 869, 131 S.W.2d 933 (1939); *Underwood v. State*, 205 Ark. 864, 171 S.W.2d 304 (1943); *Hal-*

ler v. State, 217 Ark. 646, 232 S.W.2d 829 (1950); *Nail v. State*, 225 Ark. 495, 283 S.W.2d 683 (1955); *Castle v. State*, 229 Ark. 478, 316 S.W.2d 701 (1958); *Estes v. State*, 246 Ark. 1145, 442 S.W.2d 221 (1969); *Powell v. State*, 251 Ark. 46, 471 S.W.2d 333 (1971), cert. denied, 406 U.S. 917, 92 S. Ct. 1763, 32 L. Ed. 2d 115 (1972); *Caton v. State*, 252 Ark. 420, 479 S.W.2d 537 (1972); *Flaherty v. State*, 255 Ark. 187, 500 S.W.2d 87 (1973), cert. denied, 415 U.S. 995, 94 S. Ct. 1599, 39 L. Ed. 2d 893 (1974); *Baugh v. State*, 256 Ark. 64, 505 S.W.2d 519 (1974); *Owen v. State*, 263 Ark. 493, 565 S.W.2d 607 (1978); *Limber v. State*, 264 Ark. 479, 572 S.W.2d 402 (1978); *Parker v. State*, 265 Ark. 315, 578 S.W.2d 206 (1979); *Jones v. State*, 275 Ark. 12, 627 S.W.2d 6 (1982); *Richard v. State*, 286 Ark. 410, 691 S.W.2d 872 (1985); *Hagen v. State*, 315 Ark. 20, 864 S.W.2d 856 (1993).

16-85-404. [Repealed.]

Publisher's Notes. This section, and its exceptions, concerning the rule that only one offense is chargeable in an indictment, was repealed by Acts 2005, No. 1994, § 503. The section was derived from Crim. Code, §§ 125, 126; Acts 1901, No.

11, § 1, p. 22; C. & M. Dig., §§ 3015, 3016; Acts 1921, No. 230, § 1; Init. Meas. 1936, No. 3, § 20, Acts 1937, p. 1384; Pope's Dig., §§ 3837, 3838; A.S.A. 1947, §§ 43-1009, 43-1010.

16-85-405. Sufficiency and errors.

(a)(1) The indictment is sufficient if it can be understood from the indictment:

(A) That it was found by a grand jury of a county, impaneled in a court having authority to receive the indictment;

(B) That the offense was committed within the jurisdiction of the court and at some time prior to the time of finding the indictment; and

(C) That the act or omission charged as the offense is stated with such a degree of certainty so as to satisfy due process of law.

(2) No indictment is insufficient, nor can the trial, judgment, or other proceeding thereon be affected, by reason of any defect which does not prejudice the substantial rights of the defendant.

(b) An error as to the name of the defendant shall not vitiate the indictment or proceedings on the indictment, and if the defendant's true name is discovered at any time before execution of the indictment, an entry shall be made on the docket of the court of the defendant's true name, referring to the fact of the defendant's being indicted by the name mentioned in the indictment, and the subsequent proceedings shall be in the defendant's true name.

(c) The statement in the indictment as to the time at which the offense was committed is not material except as a statement that it was committed before the time of finding the indictment, except where the time is a material ingredient in the offense.

(d) The words used in a statute to define an offense need not be strictly pursued in an indictment, but other words conveying the same meaning may be used.

History. Crim. Code, §§ 124, 127-137; C. & M. Dig., §§ 3013, 3014, 3017-3026; Pope's Dig., §§ 3835, 3836, 3839-3848; A.S.A. 1947, §§ 43-1011 — 43-1022; Acts 2005, No. 1994, § 318.

Amendments. The 2005 amendment rewrote this section.

CASE NOTES

ANALYSIS

Defendant's name.

Injured persons.

—Ownership of property.

Instruments.

Jurisdiction and venue.

Particular language.

Perjury.

Plaintiff's name.

Presumptions and judicial notice.

Statutory language.

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Defendant's Name.

The doctrine of *idem sonans* held not to apply. *Woods v. State*, 123 Ark. 111, 184 S.W. 409 (1916).

One indicted under one name and tried and convicted under another cannot afterward raise the objection that a correction was made before conviction. *Martin v. State*, 161 Ark. 177, 255 S.W. 1094 (1923); *Daniels v. State*, 186 Ark. 255, 53 S.W.2d 231 (1932).

The minor misspelling of the victim's name in the information did not constitute a fatal defect as the rights of the defendant were not prejudiced. *Purifoy v. State*, 307 Ark. 482, 822 S.W.2d 374 (1991).

Injured Persons.

Error as to name of victim held immaterial. *State v. Seely*, 30 Ark. 162 (1875); *Bennett v. State*, 84 Ark. 97, 104 S.W. 928 (1907); *Andrews v. State*, 100 Ark. 184, 139 S.W. 1134 (1911); *Sutton v. State*, 163 Ark. 468, 260 S.W. 403 (1924).

It is not necessary in an indictment for

larceny or embezzlement to name those composing the partnership whose money has been stolen or embezzled. *Ivey v. State*, 109 Ark. 446, 160 S.W. 208 (1913); *Hughes v. State*, 109 Ark. 403, 160 S.W. 209 (1913).

—Ownership of Property.

Where two or more counts are used to charge the ownership of property in different persons so as to meet the contingencies of the evidence as to ownership, the prosecuting attorney should state that fact to the court on the demurrer and make it appear of record that only one offense was intended. *State v. Jourdan*, 32 Ark. 203 (1877).

Erroneous or incomplete allegation of ownership not material or prejudicial. *Tucker v. State*, 194 Ark. 528, 108 S.W.2d 890 (1937); *Eason v. State*, 198 Ark. 885, 132 S.W.2d 5 (1939); *Johnson v. State*, 199 Ark. 196, 133 S.W.2d 15 (1939); *Tate v. State*, 204 Ark. 470, 163 S.W.2d 150 (1942).

Evidence sufficient to show information was not demurrable on ground of being vague, indefinite and uncertain. *Smith v. State*, 199 Ark. 900, 136 S.W.2d 673 (1940).

An erroneous allegation of ownership of property does not affect any substantial right of the defendant charged if the offense is described with such certainty as to identify the act so there can be no doubt about the particular offense charged. *Boyette v. State*, 265 Ark. 707, 580 S.W.2d 473 (1979).

Instruments.

Where an indictment for forgery of a lost instrument sets out its substance,

without alleging that the defendant destroyed it, it is error to charge the jury that a misdescription of the instrument is immaterial. *Bench v. State*, 63 Ark. 488, 39 S.W. 360 (1897).

As a general rule, an indictment for forgery of a bank check should set forth the instrument according to its tenor and should purport to do so, and it will not suffice to set it forth accurately in fact if it does not set forth its tenor; but if the instrument is lost or destroyed, or is in the possession of the accused or is otherwise inaccessible to the pleader, the substance will suffice. *Crossland v. State*, 77 Ark. 537, 92 S.W. 776 (1906).

An indictment for forgery of a certain writing which alleges that the writing "is in substance as follows," and the writing is thereupon set out so minutely and in detail as to exclude the idea that the substance alone is merely set out, will be taken as if the writing was set out according to its tenor. *Evans v. State*, 94 Ark. 400, 127 S.W. 743 (1910).

Jurisdiction and Venue.

The venue must be proved on the trial, though not alleged in the indictment. *Thetstone v. State*, 32 Ark. 179 (1877).

Where the name of the county appears in the caption, and is referred to in the body of the indictment, it is sufficient. *State v. Hunn*, 34 Ark. 321 (1879); *Hughes v. State*, 154 Ark. 621, 243 S.W. 70 (1922).

Evidence held sufficient to prove jurisdiction and venue. *Hampton v. State*, 67 Ark. 266, 54 S.W. 746 (1899); *Meador v. State*, 201 Ark. 1083, 148 S.W.2d 653 (1941); *Ward v. State*, 203 Ark. 1024, 160 S.W.2d 864 (1942); *Wise v. State*, 204 Ark. 743, 164 S.W.2d 897 (1942); *Trotter v. State*, 206 Ark. 690, 177 S.W.2d 173 (1944).

Where an indictment alleged that the crime was committed in a certain county but failed to allege in which of the two districts of the county it was committed, it will be considered that it was committed in the district in which the grand jury was impaneled. *Cegars v. State*, 150 Ark. 648, 235 S.W. 36 (1921).

Whether the crime was committed in the alleged county was a jury question. *Heath v. State*, 207 Ark. 425, 181 S.W.2d 231 (1944).

Charging the location at which an offense occurred is necessary to establish

the jurisdiction of the court; therefore, it is sufficient if the court having jurisdiction of the offense alleged can be determined from the information. *Johnson v. State*, 292 Ark. 632, 732 S.W.2d 817 (1987).

Particular Language.

As to omission and use of certain descriptive words, see: *Holt v. State*, 47 Ark. 196, 1 S.W. 61 (1886); *Kansas City S. Ry. v. State*, 194 Ark. 80, 106 S.W.2d 163 (1937); *Davis v. State*, 196 Ark. 721, 119 S.W.2d 527 (1938); *Atha v. State*, 217 Ark. 599, 232 S.W.2d 452 (1950).

It is enough if the information sufficiently informs the defendant of the charge or charges so that a defense can be prepared. *Dean v. State*, 293 Ark. 75, 732 S.W.2d 855 (1987).

Information alleging that defendant had three prior "arrests" rather than three prior "convictions" held sufficient where evidence showed that defendant did in fact have three prior convictions. *Johnson v. State*, 55 Ark. App. 117, 932 S.W.2d 347 (1996).

Perjury.

Indictment for perjury held insufficient. *Harp v. State*, 59 Ark. 113, 26 S.W. 714 (1894).

An indictment for perjury will be sufficient if it alleges that the perjured testimony was material but does not specify how it was material. *Loudermilk v. State*, 110 Ark. 549, 162 S.W. 569 (1913).

In an indictment charging the defendant with perjury, it is not sufficient merely to aver that the oath or affidavit was false; it is essential that it appear what the truth is, but that requirement is met if the allegation that a certain statement is false necessarily implies that the converse is true and necessarily implies what the converse is. *Loudermilk v. State*, 110 Ark. 549, 162 S.W. 569 (1913); *Atkinson v. State*, 133 Ark. 341, 202 S.W. 709 (1916).

Several assignments of perjury may be embraced in one count and all the several particulars in which the accused swore falsely may be embraced in one count, and proof of falsity of any one or more of the assignments will justify a conviction. *Atkinson v. State*, 133 Ark. 341, 202 S.W. 709 (1916).

An indictment for perjury in procuring a marriage license alleging that it was ma-

terial that an affidavit be made to secure the license need not set out the facts making it material. *Cox v. State*, 164 Ark. 126, 261 S.W. 303 (1924).

An indictment for perjury need not refer to the statute pursuant to which the oath was administered. *Cox v. State*, 164 Ark. 126, 261 S.W. 303 (1924).

In indictments, for perjury, the falsity of the testimony or statement for which the defendant is indicted may be shown to be material either by direct averment or by allegation from which the materiality appears. *Cockrum v. State*, 186 Ark. 14, 52 S.W.2d 642 (1932).

Indictment for perjury held sufficient. *Cockrum v. State*, 186 Ark. 14, 52 S.W.2d 642 (1932); *Cluck v. State*, 192 Ark. 1036, 96 S.W.2d 489 (1936).

Plaintiff's Name.

The State was permitted on the day before trial to amend the information to change the name of one of the victims where the change did not prejudice the presenting of a defense. *Lovett v. State*, 330 Ark. 33, 952 S.W.2d 644 (1997).

Presumptions and Judicial Notice.

Chastity of a female is presumed and need not be alleged in a prosecution for seduction. *Willhite v. State*, 84 Ark. 67, 104 S.W. 531 (1907).

The Supreme Court will take judicial notice of cattle dipping rules promulgated by the board of control of agricultural experiment station and they need not be alleged in the indictment or proved. *Palmer v. State*, 137 Ark. 160, 208 S.W. 436 (1919).

Supreme Court takes judicial notice that Oklahoma is a dry state and it is not necessary to state that fact in the information in a prosecution for unlawful transportation of whiskey. *Jones v. State*, 198 Ark. 354, 129 S.W.2d 249 (1939).

Statutory Language.

An indictment for a statutory offense must state all of the circumstances that constitute the offense, no case being brought by construction within the statute unless it is completely within its words; however, the precise words of the statute need not be used, but words of equivalent import, or more extensive signification, which necessarily include the words of the statute, may be substituted.

Wood v. State, 47 Ark. 488, 1 S.W. 709 (1886).

An indictment which states a statutory offense with such a degree of certainty as to enable the court to pronounce judgment upon conviction according to the rights of the case, and which states the acts constituting the offense in ordinary and concise language in such manner as to enable a person of common understanding to know what is intended, is sufficient even though the facts alleged to constitute the offense are not couched in the precise language of the statute creating the offense. *Wood v. State*, 47 Ark. 488, 1 S.W. 709 (1886); *State v. Bond*, 151 Ark. 203, 235 S.W. 801 (1921).

Although an information is drawn in the language of a particular section of the statute and such section is not applicable, if, by reasonable construction, the language of the information charges an offense against the laws of the state under any other provision of the statutes, the proceeding should not be nullified. *Baker v. State*, 200 Ark. 688, 140 S.W.2d 1008 (1940).

Sufficiency.

Indictment or information held sufficient. *Beard v. State*, 79 Ark. 293, 95 S.W. 995, 97 S.W. 667 (1906), appeal dismissed, 207 U.S. 601, 28 S. Ct. 258, 52 L. Ed. 359 (1907); *State v. Peyton*, 93 Ark. 406, 125 S.W. 416 (1910); *Pearce v. State*, 97 Ark. 5, 132 S.W. 986 (1910); *Gurley v. State*, 179 Ark. 1149, 20 S.W.2d 886 (1929); *Green v. State*, 185 Ark. 1098, 51 S.W.2d 511 (1932); *Slinkard v. State*, 193 Ark. 765, 103 S.W.2d 50 (1937); *Brockelhurst v. State*, 195 Ark. 67, 111 S.W.2d 527 (1937); *Craig v. State*, 195 Ark. 925, 114 S.W.2d 1073 (1938); *Budd v. State*, 198 Ark. 869, 131 S.W.2d 933 (1939); *Johnson v. State*, 199 Ark. 196, 133 S.W.2d 15 (1939); *Rowland v. State*, 213 Ark. 780, 213 S.W.2d 370 (1948), cert. denied, 336 U.S. 918, 69 S. Ct. 641, 93 L. Ed. 1081; *Underdown v. State*, 220 Ark. 834, 250 S.W.2d 131 (1952); *Jackson v. State*, 226 Ark. 731, 293 S.W.2d 699 (1956); *Castle v. State*, 229 Ark. 478, 316 S.W.2d 701 (1958); *England v. State*, 234 Ark. 421, 352 S.W.2d 582 (1962); *Edwards v. State*, 244 Ark. 1145, 429 S.W.2d 92 (1968); *Haupt v. State*, 249 Ark. 485, 459 S.W.2d 565 (1970); *Ridgeway v. State*, 251 Ark. 157, 472 S.W.2d 108 (1971); *Williford v. State*, 252

Ark. 397, 479 S.W.2d 244 (1972); *Henderson v. State*, 255 Ark. 870, 503 S.W.2d 889 (1974); *Haynie v. State*, 257 Ark. 542, 518 S.W.2d 492 (1975); *Fortner v. State*, 258 Ark. 591, 528 S.W.2d 378 (1975); *Owen v. State*, 263 Ark. 493, 565 S.W.2d 607 (1978); *Beard v. State*, 269 Ark. 16, 598 S.W.2d 72 (1980); *Browning v. State*, 274 Ark. 13, 621 S.W.2d 688 (1981); *Van Daley v. State*, 20 Ark. App. 127, 725 S.W.2d 574 (1987).

In formal charges of offenses committed, it is sufficient if the state of facts set out charges a specific offense, and no charge will be deemed insufficient which does not tend to prejudice the substantial rights of defendant on the merits. *Kansas City S. Ry. v. State*, 194 Ark. 80, 106 S.W.2d 163 (1937).

Indictment or information held insufficient to support conviction. *Robbins v. State*, 219 Ark. 376, 242 S.W.2d 640 (1951).

Indictment or information is sufficient if it puts the accused on notice as to the nature of the charge. *Underdown v. State*, 220 Ark. 834, 250 S.W.2d 131 (1952).

Time.

The dismissal of an indictment because of a discrepancy as to the day of the offense amounted to an acquittal after the jury was impaneled, as under this section the indictment was good. *Lee v. State*, 26 Ark. 260 (1870).

Indictment is sufficient even though it charges crime committed on future or impossible date. *Conrand v. State*, 65 Ark. 559, 47 S.W. 628 (1898); *Hunter v. State*, 93 Ark. 275, 124 S.W. 1028 (1910).

Indictment sufficient which left date of offense blank. *Grayson v. State*, 92 Ark. 413, 123 S.W. 388 (1909); *Threadgill v. State*, 99 Ark. 126, 137 S.W. 814 (1911).

Time held not be a material ingredient of the offense. *Venable v. State*, 177 Ark. 91, 5 S.W.2d 716 (1928); *Buchanan v. State*, 214 Ark. 835, 218 S.W.2d 700 (1948); *Haller v. State*, 217 Ark. 646, 232 S.W.2d 829 (1950); *Payne v. State*, 224 Ark. 309, 272 S.W.2d 829 (1954).

Amendment to change date of offense held proper. *Scoggins v. State*, 258 Ark. 749, 528 S.W.2d 641 (1975); *Robinson v. State*, 11 Ark. App. 18, 665 S.W.2d 890 (1984).

Where the state was allowed to amend the information to allege that the crime

occurred between November 1, 1983, and January 15, 1984, rather than on or about January 15, 1984, no prejudice resulted from the court's action because the particular time was not an ingredient of the offense. *Huffman v. State*, 288 Ark. 321, 704 S.W.2d 627 (1986).

In prosecution for sexual abuse in the first degree, the court was correct in permitting the jury to hear the testimony of both the prosecutrix that the incident took place on December 15 and the witness who testified as to events occurring on December 8, the conflict as to the date going only to the weight of the evidence. *West v. State*, 290 Ark. 329, 719 S.W.2d 684 (1986).

A bill of particulars as to the precise time the offense was committed need not be granted unless the time is material to the allegation. *Johnson v. State*, 292 Ark. 632, 732 S.W.2d 817 (1987).

Victim's inability to fix definite date of rape does not defeat the charge, and any discrepancies in the testimony concerning the date of the offense were for the jury to resolve. *Yates v. State*, 301 Ark. 424, 785 S.W.2d 199 (1990).

Where the information alleged the offenses occurred in June or July, and the victim, a child, testified the incidents did not occur after the end of May, the time a crime is alleged to have occurred is not of critical significance unless the date is material to the offense, particularly with sexual crimes against children and infants. *Fry v. State*, 309 Ark. 316, 829 S.W.2d 415 (1992).

Where the particular time was not an ingredient of the offense, amendment of the information just before trial as to the time of the offense was permissible. *Harris v. State*, 320 Ark. 677, 899 S.W.2d 459 (1995).

Generally speaking, the time a crime is alleged to have occurred is not of critical significance unless the date is material to the offense. *Wilson v. State*, 320 Ark. 707, 898 S.W.2d 469 (1995).

Exact dates of the sexual acts committed by defendant against the victim were immaterial to the offenses because the proof clearly showed that defendant had sexual intercourse with the victim while she was under the age of 14 and defendant's defense was that he did not commit the crimes. *Martin v. State*, 354 Ark. 289, 119 S.W.3d 504 (2003).

Variance.

Inconsistency between charge and proof held immaterial. *Rawlings v. State*, 117 Ark. 539, 174 S.W. 150 (1915); *Cluck v. State*, 192 Ark. 1036, 96 S.W.2d 489 (1936); *Warren v. State*, 250 Ark. 247, 464 S.W.2d 564 (1971); *Hall v. State*, 276 Ark. 245, 634 S.W.2d 115 (1982), cert. denied, 459 U.S. 1109, 103 S. Ct. 738, 74 L. Ed. 2d 960 (1983).

Variance between allegation and proof held fatal. *Von Tonglin v. State*, 200 Ark. 1142, 143 S.W.2d 185 (1940).

Amendment to information or indictment held permissible where there was no material variation or prejudice. *Collins v. State*, 200 Ark. 1027, 143 S.W.2d 1 (1940); *Miller v. State*, 250 Ark. 199, 464 S.W.2d 594 (1971).

Notwithstanding variance in the wording of an information and the proof introduced at trial, reversal is not warranted unless the variance prejudiced substantial rights of the accused. *Tackett v. State*, 298 Ark. 20, 766 S.W.2d 410 (1989).

Cited: *Scoggins v. State*, 32 Ark. 205

(1877); *Buell v. State*, 45 Ark. 336 (1885); *Leak v. State*, 61 Ark. 599, 33 S.W. 1067 (1896); *Bledsoe v. State*, 64 Ark. 474, 42 S.W. 899 (1897); *Ward v. State*, 70 Ark. 204, 66 S.W. 926 (1902); *James v. State*, 110 Ark. 170, 160 S.W. 1090 (1913); *Oakes v. State*, 135 Ark. 221, 205 S.W. 305 (1918); *Bender v. State*, 202 Ark. 606, 151 S.W.2d 668 (1941); *Haller v. State*, 217 Ark. 646, 232 S.W.2d 829 (1950); *Willis v. State*, 221 Ark. 162, 252 S.W.2d 618 (1952); *Ragsdale v. State*, 222 Ark. 499, 262 S.W.2d 91 (1953); *Smith v. State*, 231 Ark. 235, 330 S.W.2d 58 (1959); *Estes v. State*, 246 Ark. 1145, 442 S.W.2d 221 (1969); *Brewer v. State*, 251 Ark. 7, 470 S.W.2d 581 (1971); *Powell v. State*, 251 Ark. 46, 471 S.W.2d 333 (1971); *Wilson v. State*, 263 Ark. 764, 569 S.W.2d 87 (1978); *Drew v. State*, 8 Ark. App. 120, 648 S.W.2d 836 (1983); *Richard v. State*, 286 Ark. 410, 691 S.W.2d 872 (1985); *Speer v. State*, 18 Ark. App. 1, 708 S.W.2d 94 (1986); *Dunlap v. State*, 303 Ark. 222, 795 S.W.2d 920 (1990).

16-85-406. Construction of words.

The words used in an indictment must be construed according to their usual acceptance in common language, except words and phrases defined by law, which are to be construed according to their legal meaning.

History. *Crim. Code*, § 138; *C. & M. Dig.*, § 3027; *Pope's Dig.*, § 3849; *A.S.A.* 1947, § 43-1023.

CASE NOTES**Public Highway.**

Although a certain city street is not on a state-numbered highway, it is a "public highway" according to the usual acceptance in common language, and therefore

an indictment which used the term "public highway" did not prejudice any substantial right of the defendant. *Atha v. State*, 217 Ark. 599, 232 S.W.2d 452 (1950).

16-85-407. Amendment of indictment and filing of bill of particulars.

(a) The prosecuting attorney or other attorney representing the state, with leave of the court, may amend an indictment as to matters of form or may file a bill of particulars.

(b) However, no indictment shall be amended nor bill of particulars filed so as to change the nature of the crime charged or the degree of the crime charged.

(c) All amendments and bills of particulars shall be noted of record.

History. Init. Meas. 1936, No. 3, § 24, Acts 1937, p. 1384; Pope's Dig., § 3853; A.S.A. 1947, § 43-1024.

RESEARCH REFERENCES

Ark. L. Rev. Criminal Procedure — Amendment of Indictments and Informations, 9 Ark. L. Rev. 62.

CASE NOTES

ANALYSIS

In general.

Construction.

Alternative charges.

Change in nature or degree.

Prejudice or surprise.

Validity of amendment.

In General.

Amendment of an indictment, or by implication an information, may be made with leave of court unless the amendment changes the nature of the crime charged or the degree of the crime charged; that holds true even after the jury has been sworn unless the amendment creates an unfair surprise. *Neely v. State*, 317 Ark. 312, 877 S.W.2d 589 (1994).

Construction.

This section, though limiting amendments to matters of form, must be read in connection with § 16-85-403. *Underwood v. State*, 205 Ark. 864, 171 S.W.2d 304 (1943).

Alternative Charges.

The rule permitting alternative charges for the same offense, § 16-85-404(a), is not in conflict with subsection (b) of this section, which prohibits an amendment to an indictment which changes the nature or degree of the crime charged. *Rucker v. State*, 320 Ark. 643, 899 S.W.2d 447 (1995).

Change in Nature or Degree.

Amendment held not to change the nature or degree of the crime charged. *Collins v. State*, 200 Ark. 1027, 143 S.W.2d 1 (1940); *Ingle v. State*, 211 Ark. 39, 198 S.W.2d 996 (1947); *Lee v. State*, 229 Ark. 354, 315 S.W.2d 916 (1958), cert. denied, 359 U.S. 930, 79 S. Ct. 616, 3 L. Ed. 2d 633 (1959); *Castle v. State*, 229 Ark. 478, 316 S.W.2d 701 (1958); *Silas v. State*, 232 Ark.

248, 337 S.W.2d 644 (1960), cert. denied, 365 U.S. 821, 81 S. Ct. 705, 5 L. Ed. 2d 698 (1961); *Washington v. State*, 248 Ark. 318, 451 S.W.2d 449 (1970); *Murray v. State*, 249 Ark. 887, 462 S.W.2d 438 (1971); *Ridgeway v. State*, 251 Ark. 157, 472 S.W.2d 108 (1971); *Albright v. State*, 253 Ark. 671, 488 S.W.2d 11 (1972); *Finch v. State*, 262 Ark. 313, 556 S.W.2d 434 (1977); *Owen v. State*, 263 Ark. 493, 565 S.W.2d 607 (1978); *Prokos v. State*, 266 Ark. 50, 582 S.W.2d 36 (1979); *Workman v. State*, 267 Ark. 103, 589 S.W.2d 20 (1979); *Jones v. State*, 275 Ark. 12, 627 S.W.2d 6 (1982); *Pickens v. Lockhart*, 714 F.2d 1455 (8th Cir. 1983); *State v. Brown*, 283 Ark. 304, 675 S.W.2d 822 (1984); *Lincoln v. State*, 287 Ark. 16, 696 S.W.2d 316 (1985).

Amendment reducing charge held proper. *Silas v. State*, 232 Ark. 248, 337 S.W.2d 644 (1960), cert. denied, 365 U.S. 821, 81 S. Ct. 705, 5 L. Ed. 2d 698 (1961).

This section should not be construed to permit a defendant to complain of a change that is wholly to his advantage; therefore the trial court was not in error in allowing the state to reduce an original charge of capital murder to the lesser offense of first-degree murder. *Huckaby v. State*, 262 Ark. 413, 557 S.W.2d 875 (1977).

Amendment held to change the nature or degree of the crime charged. *Harmon v. State*, 277 Ark. 265, 641 S.W.2d 21 (1982), overruled in part on other grounds by *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986).

Amendment of an information which upgraded the offense was proper where the amendment did not change the nature or degree of the offense but authorized a more severe penalty and, although the prosecutor did not amend the information until the day of trial, defendant did not claim surprise, ask the trial judge for a

continuance or tender proof of prejudice on appeal. *Wilson v. State*, 286 Ark. 430, 692 S.W.2d 620 (1985).

Where the only effect of the amendment to the information was to split the original single count of capital murder into two counts, under the new statutory definition of that offense, the amendment was a matter of form that did not change the nature of the offense charged. *Mitchell v. State*, 306 Ark. 464, 816 S.W.2d 566 (1991).

Defendant rightly invoked subsection (b) of this section on the basis that the degree of the offenses was changed when the two counts were amended from attempted rape to rape, but no prejudice resulted from the amendment. *Holloway v. State*, 312 Ark. 306, 849 S.W.2d 473 (1993).

Prejudice or Surprise.

Defendant held not to have been surprised or prejudiced by amendment. *Albright v. State*, 253 Ark. 671, 488 S.W.2d 11 (1972); *Workman v. State*, 267 Ark. 103, 589 S.W.2d 20 (1979); *Crafton v. State*, 274 Ark. 319, 624 S.W.2d 440 (1981); *Horne v. State*, 12 Ark. App. 301, 677 S.W.2d 856 (1984).

Defendant held prejudiced by amendment. *Prokos v. State*, 266 Ark. 50, 582 S.W.2d 36 (1979).

Trial court did not err in permitting the prosecutor to nolle prosequere a first-degree murder charge and then file a new information charging defendant with capital felony murder where there was no surprise or prejudice to defendant and such procedure did not conflict with this section. *Abernathy v. State*, 278 Ark. 250, 644 S.W.2d 590 (1983).

Amendments to an information are permitted under this section if the amendment does not change the nature or degree of the crime charged, and if the accused is not surprised by the amendment. *Lincoln v. State*, 287 Ark. 16, 696 S.W.2d 316 (1985).

Where defendant knew of the state's plan to amend three days prior to trial, and he did not move for a continuance, there was no prejudice in the trial court's allowance of the amendment. *Mitchell v. State*, 306 Ark. 464, 816 S.W.2d 566 (1991).

As a result of the state's filing of a sufficiently specific amended information,

in itself a bill of particulars, defendant demonstrated no prejudice. *Nance v. State*, 323 Ark. 583, 918 S.W.2d 114 (1996), cert. denied, 519 U.S. 847, 117 S. Ct. 134, 136 L. Ed. 2d 83 (1996).

Amended information by the State was proper where defendant was not surprised, made no motion for a continuance, and no prejudice was shown; as such, there was no need for reversal under this section. *Hoover v. State*, 353 Ark. 424, 108 S.W.3d 618 (2003).

Validity of Amendment.

Particular amendments held proper. *Brewer v. State*, 195 Ark. 477, 112 S.W.2d 976 (1938); *Johnson v. State*, 197 Ark. 1016, 126 S.W.2d 289 (1939); *Bennett v. State*, 201 Ark. 237, 144 S.W.2d 476 (1940); *Tate v. State*, 204 Ark. 470, 163 S.W.2d 150 (1942); *Melton v. State*, 212 Ark. 968, 209 S.W.2d 99 (1948); *Cooley v. State*, 213 Ark. 503, 211 S.W.2d 114 (1948).

Defect in information held cured by amendment. *Underwood v. State*, 205 Ark. 864, 171 S.W.2d 304 (1943).

Information amended by deleting certain words. *Massey v. State*, 207 Ark. 675, 182 S.W.2d 671 (1944).

Court allowed prosecutor to insert name of defendant in charging clause where the body of the information showed who was accused by the information. *Williams v. State*, 215 Ark. 757, 223 S.W.2d 190 (1949).

Amendment held invalid. *Hardwick v. State*, 220 Ark. 464, 248 S.W.2d 377 (1952).

Amending the information to read "serious physical injury" rather than "personal injury" to conform to the 1993 amendment of § 5-54-125(c)(3) after prosecution had presented its case-in-chief changed neither the degree nor the nature of the offense charged, and thus no error occurred. *Witherspoon v. State*, 319 Ark. 313, 891 S.W.2d 371 (1995).

Pretrial amendment of an information that charged capital murder on the basis of felony murder to add, as an alternative, the charge of capital murder on the basis of premeditated and deliberated purpose, did not change the nature of the crime charged in violation of subsection (b), nor did the amendment adding an allegation of habitual offender change the nature or degree of the crime. *Nance v. State*, 323

Ark. 583, 918 S.W.2d 114 (1996), cert. denied, 519 U.S. 847, 117 S. Ct. 134, 136 L. Ed. 2d 83 (1996).

There is no requirement that an amendment to an information be made in writing. *Johnson v. State*, 55 Ark. App. 117, 932 S.W.2d 347 (1996).

Cited: *Crabtree v. State*, 238 Ark. 358, 381 S.W.2d 729 (1964); *Henderson v. State*, 255 Ark. 870, 503 S.W.2d 889 (1974); *Dolphus v. State*, 256 Ark. 248, 506

S.W.2d 538 (1974); *Richard v. State*, 286 Ark. 410, 691 S.W.2d 872 (1985); *Allen v. State*, 296 Ark. 33, 751 S.W.2d 347 (1988); *Bell v. State*, 296 Ark. 458, 757 S.W.2d 937 (1988); *Smith v. State*, 300 Ark. 330, 778 S.W.2d 947 (1989); *Sossamon v. State*, 31 Ark. App. 131, 789 S.W.2d 738 (1990); *Martin v. State*, 316 Ark. 715, 875 S.W.2d 81 (1994); *Kelch v. Erwin*, 333 Ark. 567, 970 S.W.2d 255 (1998).

16-85-408. Public inspection and disclosure.

(a) When a grand jury indictment for any offense known to the laws of this state shall be found against any person not in actual confinement or held by recognizance to answer to the indictment, the indictment shall not be open to the inspection of any person except the judge and clerk of the court and the prosecuting attorney until the defendant has been arrested.

(b)(1) No judge, clerk, prosecuting attorney, or other officer of any court shall disclose the fact of any indictment's being found until the defendant has been arrested or recognized to answer the indictment.

(2) Any judge, clerk, or other officer violating the provisions of subdivision (b)(1) of this section shall be guilty of a violation and upon conviction shall be fined in any sum not exceeding one thousand dollars (\$1,000).

(c) The provisions of this section shall not extend to any officer making the disclosure by the issuing or in the execution of any process on the indictment or in any other manner when it shall become necessary in the discharge of any official duty.

History. Rev. Stat., ch. 45, §§ 86-89; C. & M. Dig., §§ 2819, 3031-3033; Pope's Dig., §§ 3537, 3855-3857; A.S.A. 1947, §§ 43-1025 — 43-1028; Acts 2005, No. 1994, § 84.

Amendments. The 2005 amendment substituted "When a grand jury" for "When an" in (a); and substituted "violation" for "misdemeanor" in (b)(2).

RESEARCH REFERENCES

Ark. L. Rev. Watkins, Access to Public Records under the Arkansas Freedom of Information Act, 38 Ark. L. Rev. 741.

CASE NOTES

ANALYSIS

Presumption.
Record entry.
Venue.

Presumption.

It is presumed that an offense charged was committed within the jurisdiction of

the court in which the charge is filed, unless the evidence affirmatively shows otherwise. *Baggett v. State*, 15 Ark. App. 113, 690 S.W.2d 362 (1985).

Record Entry.

When an indicted party is not in custody, it is sufficient for the record entry of

the finding of the indictment to describe it by number. *Fitzpatrick v. State*, 37 Ark. 238 (1881).

Venue.

In prosecution for interference with custody where defendant presented his motion to transfer case on basis of lack of venue from one county to another prematurely at the close of the state's evidence, the state was not required to put on proof that the interference with custody charge was committed in first county, as the information stated that the crime was committed therein and venue was presumed proper unless there was affirmative evidence to the contrary, and as the record

reflected that there was no such evidence at that stage in the proceedings the trial court did not abuse its discretion in denying defendant's motion to transfer, for while admittedly defendant may have put on some proof following his motion to transfer to the effect that he did not consider committing the crime until he returned to second county and that he fled from that county with the child, independent review of the record revealed that defendant did not at any subsequent time during the course of the trial renew his motion to transfer. *Baggett v. State*, 15 Ark. App. 113, 690 S.W.2d 362 (1985).

Cited: *Humphries v. State*, 33 Ark. 713 (1878).

16-85-409. Recording.

(a) It shall be the duty of the clerks of the circuit courts of this state, whenever an arrest has been made of any person against whom an indictment has been found by the grand jury, properly returned, to record the indictment, with the entries thereon, in a book to be kept by him or her for that purpose.

(b) In all cases where an indictment may be lost or destroyed, or where the indictment cannot be found, a copy of the record thereof, as provided in subsection (a) of this section, duly certified by the clerk under his or her hand and the seal of the court, shall be taken and used for all purposes in any of the courts of this state the same as the original indictment.

History. Acts 1881, No. 58, §§ 1, 2, p. 106; C. & M. Dig., §§ 3034, 3035; Pope's

Dig., §§ 3858, 3859; A.S.A. 1947, §§ 43-1029, 43-1030.

CASE NOTES

ANALYSIS

Fee.
Presumption.

Fee.

The clerk is not entitled to charge a county for recording an indictment. *Hempstead County v. Harkness*, 73 Ark. 600, 84 S.W. 799 (1905).

Presumption.

It is legally presumed from the fact that the clerk recorded an indictment that it was found by the grand jury and returned into court; and in cases of the loss or destruction of the original, the defendant may be tried and convicted on a copy from the record. *Miller v. State*, 40 Ark. 488 (1883).

16-85-410. [Repealed.]

Publisher's Notes. This section, concerning second indictments, was repealed by Acts 2005, No. 1994, § 504. The section

was derived from Rev. Stat., ch. 45, § 90; C. & M. Dig., § 3037; Pope's Dig., § 3861; A.S.A. 1947, § 43-1031.

SUBCHAPTER 5 — GRAND JURY PROCEEDINGS

SECTION.

- 16-85-501. Appointment of foreman and clerk.
- 16-85-502. Minutes.
- 16-85-503. Scope of inquiry.
- 16-85-504. Witnesses — Subpoena.
- 16-85-505. Witnesses — Oath.
- 16-85-506. Witnesses — Joint offenders.
- 16-85-507. Witnesses — Refusal to testify.
- 16-85-508. Witnesses — Securing testimony of material witnesses.
- 16-85-509. Witnesses — Compensation.

SECTION.

- 16-85-510. Disclosure of newspaper, periodical, or radio station sources.
- 16-85-511. Evidence.
- 16-85-512. Persons permitted to be present.
- 16-85-513. Indictment.
- 16-85-514. Disclosure of information.
- 16-85-515. Advice of court or prosecuting attorney.
- 16-85-516. Indictment of grand juror.
- 16-85-517. Special grand jury.
- 16-85-518. Experts — Expenses.

Effective Dates. Acts 1871, No. 28, § 20: effective 60 days after passage.

Acts 1883, No. 49, § 3: effective on passage.

Acts 1889, No. 62, § 4: June 1, 1889.

Acts 1933, No. 29, § 3: approved Feb. 14, 1933. Emergency clause provided: "Whereas, grand juries, prosecuting attorneys and judges of the circuit courts of this State are in many instances being handicapped and delayed in the discharge of their duties because of the want of any provision for expeditious and adequate recording and reporting of the proceedings of grand juries, and such delays result in additional and unnecessary expense to the State and counties, and it is desirable that said condition be immediately remedied; now therefore, an emergency is hereby declared to exist and this Act shall take effect and be in force immediately from and after its passage."

Acts 1949, No. 254, § 3: approved Mar. 8, 1949. Emergency clause provided: "Whereas, it is necessary to amend and improve judicial procedure and criminal

law in connection with the privilege of editors, reporters, writers and radio stations and to clarify the same and this Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared to exist and this Act shall be in full force and effect from and after its passage."

Acts 1983, No. 176, § 3: Feb. 15, 1983. Emergency clause provided: "The General Assembly hereby finds that there is presently no method by which the State of Arkansas can secure the attendance of witnesses before the grand jury when there is a probability the witness will absent himself therefrom. For the efficient and fair administration of justice, a system similar to the federal law on securing testimony of material witnesses, 18 U.S.C. Section 3149, is highly desirable. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Validity of indictment as affected by substitution or addition of grand jurors after commencement of investigation. 2 ALR 4th 980.

Finding or return of indictment, or filing of information, as tolling limitation period. 18 ALR 4th 1202.

Failure to swear or irregularity in swearing witnesses appearing before grand jury as ground for dismissal of indictment. 23 ALR 4th 154.

Presence of unauthorized persons during state grand jury proceedings as affecting indictment. 23 ALR 4th 397.

Individual's right to present complaint or evidence of criminal offense to grand jury. 24 ALR 4th 316.

Am. Jur. 38 Am. Jur. 2d, Grand J., § 32 et seq.

Ark. L. Rev. Theory of Testimonial Competency and Privilege, 4 Ark. L. Rev. 377.

Witness Privileges, 15 Ark. L. Rev. 93.

Evidence — Informer's Privilege Before a Grand Jury, 23 Ark. L. Rev. 128.

Privileges, 27 Ark. L. Rev. 200.

Gingerich, The Arkansas Grand Jury, etc., 40 Ark. L. Rev. 55.

C.J.S. 38 C.J.S., Grand J., § 37 et seq.

UALR L.J. Note: An Equitable Treatment of Unauthorized Prosecutorial Promises of Immunity, 1 UALR L.J. 389.

Watkins, The Journalist's Privilege in Arkansas, 7 UALR L.J. 473.

CASE NOTES

Unconstitutional Exclusion.

Members of classes of citizens unconstitutionally excluded from selection as grand jurors could, as representatives of such excluded classes, bring an action to establish the unconstitutionality of such

selection and enjoin the functioning of such grand jury, even though there was no reason to believe that such person would be the subject of any grand jury action. *Jewell v. Stebbins*, 288 F. Supp. 600 (E.D. Ark. 1968).

16-85-501. Appointment of foreman and clerk.

(a) The court shall appoint one of the number of every grand jury as foreman.

(b) Every grand jury may appoint one of the members to be clerk, to preserve and keep minutes of their proceedings and of the evidence given before them.

(1) However, the presiding judge of the circuit court, at his or her discretion, may require the official court reporter in counties where provision is not otherwise made for a reporter to report the proceedings of the grand jury, to attend all or any sessions of the grand jury of the court, and to make reports of the proceedings of the grand jury at such sessions or such part of the proceedings as the judge of the court may direct, and to furnish to the prosecuting attorney, as promptly as practicable, transcribed, typewritten copies of all or such part of the proceedings so reported as the judge or the prosecuting attorney may request.

(2) Court reporters attending sessions of the grand jury shall be subject to the same penalties as are prescribed by law for any person divulging, except as authorized by law, any part of the proceedings of the grand jury.

(3) The official reporters of circuit courts are required to perform the duties imposed upon them in accordance with the provisions of this subsection, in addition to their other duties, and without additional compensation.

History. Rev. Stat., ch. 45, § 62; Crim. Code, § 406; Acts 1871, No. 49, § 1 [406], p. 255; C. & M. Dig., §§ 2978, 2980; Acts

1933, No. 29, § 1; Pope's Dig., §§ 3800, 3802; A.S.A. 1947, §§ 43-903, 43-905.

16-85-502. Minutes.

The minutes of the proceedings and evidence shall be delivered to the prosecuting attorney when directed by the grand jury.

History. Rev. Stat., ch. 45, § 62; C. & M. Dig., § 2981; Pope's Dig., § 3803; A.S.A. 1947, § 43-906.

CASE NOTES**Inspection.**

Refusal to permit counsel for defendant to inspect minutes of grand jury was not

error. *Arnold v. State*, 179 Ark. 1066, 20 S.W.2d 189 (1929).

16-85-503. Scope of inquiry.

(a) The grand jury must inquire:

(1) Into the case of every person imprisoned in the county jail or detention facility or on bail who has not been charged by indictment or information within sixty (60) days of arrest;

(2) Into the condition and management of the public prisons of the county; and

(3) Into the willful and corrupt misconduct in office of public officers of every description in the county.

(b) The grand jury may inquire into all public offenses committed within the jurisdiction of the court in which they are impaneled and to indict such persons as they find guilty thereof.

(c) If a member of the grand jury knows or has reason to believe that a public offense has been committed within the jurisdiction of the court, he or she must disclose the knowledge or belief to his or her fellow jurors, who must thereupon investigate the offense.

(d) Grand jurors are entitled to free access, at all reasonable times, to public prisons and to the examination, without charge, of all public records in the county.

(e) It is the duty of every grand jury at each term of the circuit court to make careful examination of the condition of the accounts of the collecting officers of the county and any matters relating to the general school fund.

History. Crim. Code, §§ 99, 104-106; Acts 1871, No. 28, § 18, p. 81; C. & M. Dig., §§ 2982-2986; Pope's Dig., §§ 3804-3808; A.S.A. 1947, §§ 43-907 — 43-911; Acts 2005, No. 1994, § 319.

Amendments. The 2005 amendment substituted "detention facility or on bail who has not been charged by indictment or information within sixty (60) days of

arrest" for "on bail to answer a criminal charge in that court who is not indicted" in (a)(1); substituted "may" for "has power, and it is their duty to" in (b); inserted "or she" and "or her" in (c); and deleted "dockets of justices of the peace" following "county" in (e).

Cross References. Duty to visit and examine condition of jail, § 12-41-508.

CASE NOTES

ANALYSIS

Prosecuting attorney.
Report.

Prosecuting Attorney.

The prosecuting attorney has the same powers as those conferred by this section upon the grand jury. *Gill v. State ex rel. Mobley*, 242 Ark. 797, 416 S.W.2d 269 (1967).

Report.

Reception or rejection of grand jury's

report criticizing former county judge held to be within the circuit court's discretion. *Ex parte Cook*, 199 Ark. 1187, 137 S.W.2d 248 (1940).

Report of grand jury should be expunged from record where it accused petitioners of conduct warranting their indictment for slander, where grand jury did indict for slander. *Ex parte Faulkner*, 221 Ark. 37, 251 S.W.2d 822 (1952).

16-85-504. Witnesses — Subpoena.

(a) The clerk, on the request of the foreman of the grand jury or of the prosecuting attorney, shall issue subpoenas for witnesses to appear before the grand jury. Upon the witnesses failing to attend in obedience thereto, the court shall proceed to coerce their attendance and may punish their disobedience by fine and imprisonment, as in the case of witnesses failing to attend on the trial.

(b) The clerk of the circuit court of every county in this state shall, on the request of the prosecuting attorney of the district in which the county is situated, issue, in vacation of the circuit court of the county, subpoenas for any witness to appear before the grand jury of the county to be impaneled at the next term of the circuit court in the county. The clerk shall deliver the subpoenas to the sheriff of the county, who shall serve them before the convening of the court. Any witness refusing to obey any subpoena so issued and served upon him or her shall be guilty of contempt of court.

History. Crim. Code, § 112; Acts 1883, 3116, 8319; Pope's Dig., §§ 3812, 3950, No. 49, § 1, p. 72; C. & M. Dig., §§ 2990, 10896; A.S.A. 1947, §§ 43-912, 43-913.

16-85-505. Witnesses — Oath.

The foreman of the grand jury shall have power to administer the oath to the witnesses appearing before the grand jury.

History. Crim. Code, § 101; C. & M. Dig., § 2987; Pope's Dig., § 3809; A.S.A. 1947, § 43-914.

CASE NOTES

Form.

No particular form of oath has been

prescribed. *State v. Green*, 24 Ark. 591 (1867).

16-85-506. Witnesses — Joint offenders.

In all cases where two (2) or more persons are jointly or otherwise concerned in the commission of any criminal offense, either of the persons may be sworn as a witness in relation to the criminal offense, but the testimony given by the witness in no instance shall be used against him or her in any criminal prosecution for the same offense.

History. Rev. Stat., ch. 45, § 67; C. & M. Dig., § 3122; Pope's Dig., § 3956; A.S.A. 1947, § 43-915; Acts 2005, No. 1994, § 294.

Amendments. The 2005 amendment substituted "criminal offense" for "crime or misdemeanor."

CASE NOTES**ANALYSIS**

Constitutionality.
Applicability.
Different offenses.
Self-incrimination.

Constitutionality.

This section is not violative of the bill of rights as one compelled to give testimony is protected from self-accusation and his common-law and constitutional privileges are secured to him. *State v. Quarles*, 13 Ark. 307 (1853); *Cossart v. State*, 14 Ark. 538 (1854).

Applicability.

This statute had no application in determining admissibility of accused's statement at the coroner's inquest, where accused was not jointly charged with any other person and she was not called as a witness against any other person. *Dunham v. State*, 207 Ark. 472, 181 S.W.2d 242 (1944).

This section applies only to proceedings before a grand jury and has no application to proceedings before the petit jury. *Rhea v. State*, 226 Ark. 581, 291 S.W.2d 505 (1956).

This section only provides use immunity for an accomplice who actually testifies before a grand jury and does not apply where a written statement has been given to a prosecuting attorney. *Hammers v. State*, 261 Ark. 585, 550 S.W.2d 432 (1977).

Different Offenses.

The protection extended by this section applies only to the same offense; conse-

quently, a person cannot be compelled to testify if his testimony will incriminate him for an offense other than the one charged in the case under consideration. *State v. Bach Liquor Co.*, 67 Ark. 163, 55 S.W. 854 (1899).

An election clerk under indictment for making a false certificate cannot be compelled to testify against election judges under indictment for making a false count, the two offenses being different, so that the clerk is not within the protection of this section. *Bates v. State*, 164 Ark. 240, 261 S.W. 315 (1924).

Self-Incrimination.

This section prohibits the testimony of a person taken before an examining court from being used against him on a subsequent prosecution for the same offense. *Marshall v. State*, 84 Ark. 88, 104 S.W. 934 (1907).

A voluntary confession by one of two participants in a bank robbery under an oath administered by the prosecuting attorney is admissible in a prosecution of the confessor alone, as not violating this section or self-incrimination under the constitution, where the confessor is warned that he need not confess and that it will be used against him. *Rowe v. State*, 224 Ark. 671, 275 S.W.2d 887 (1955).

Cited: *Ex parte Butt*, 78 Ark. 262, 93 S.W. 992 (1906); *Decker v. State*, 185 Ark. 1085, 51 S.W.2d 521 (1932); *Bratton v. State*, 213 Ark. 537, 211 S.W.2d 428 (1948); *Horner v. State*, 255 Ark. 426, 501 S.W.2d 217 (1973).

16-85-507. Witnesses — Refusal to testify.

When a witness, under examination, refuses to testify or to answer a question put to him or her by the grand jury, the foreman shall proceed with the witness into the presence of the court, and there distinctly state the refusal of the witness. If the judge, upon hearing the witness, shall decide that the witness is bound to testify or answer the question propounded, the judge shall inquire of the witness if he persists in his refusal. If the witness does persist in his refusal, the court shall proceed with him as in cases of similar refusal in open court.

History. Crim. Code, § 113; C. & M. Dig., § 2991; Pope's Dig., § 3813; A.S.A. 1947, § 43-916. for refusing testimony, Ark. Const., Art. 3, § 9.

Cross References. Investigations of elections, self-incrimination not ground Person not compelled to be witness against self, Ark. Const., Art. 2, § 8.

16-85-508. Witnesses — Securing testimony of material witnesses.

(a) If there is a reasonable belief that a material witness in any grand jury investigation may absent himself or herself from the jurisdiction or otherwise avoid service of a subpoena, a judicial officer, as defined in Arkansas Rules of Criminal Procedure 1.6(c), shall impose conditions of release pursuant to Arkansas Rules of Criminal Procedure 9.1-9.5.

(b) A warrant of arrest may be issued by the judicial officer on the affidavit or testimony of a prosecuting attorney to secure the presence of the witness at the hearing to provide for his or her release. Other witnesses may be called and examined.

(c) No material witness shall be detained because of his or her inability to comply with any condition of release if the testimony of the witness for the proceeding can be adequately secured by deposition and further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to law.

(d) When the material witness has given his or her testimony, he or she shall be released immediately.

History. Acts 1983, No. 176, § 1; A.S.A. 1947, § 43-916.1.

16-85-509. Witnesses — Compensation.

(a) It shall be the duty of the foreman of each grand jury in this state to keep an abstract showing the name of each person subpoenaed and appearing as a witness before the grand jury, the number of days attended, and the amount due the person as a witness. The abstract shall be verified by affidavit as provided in this section and may be in the following form:

“ABSTRACT OF WITNESSES

Name	No. Certifi- cate	No. Days	Mileage	Amount Due
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STATE OF ARKANSAS,

County of

I,, foreman of the Grand Jury, do solemnly swear that the above and foregoing is a true and correct abstract of the name of each witness who appeared and was in attendance before the Grand Jury, the number of days attended, and the amount due the same at the term of the Circuit Court, 20....

.....
Foreman of Grand Jury

Subscribed and sworn to before me this day of, 20....

.....
Clerk.”

(b)(1) The foreman of the grand jury shall issue a certificate to each of the witnesses showing the number of days attended and the amount due the witness, in conformity to the abstract.

(2) The certificate shall be attested by the clerk of the grand jury.

(c) Upon the presentation of the certificate to the clerk of the county court, the county court, upon examination and approval of the certificate, shall make an order allowing the certificate. After the order has been made, it shall be the duty of the clerk of the county court to draw his or her warrant in favor of the holder of the certificate for the amount adjudged to be due thereon and to file the certificate in his or her office.

History. Acts 1889, No. 62, §§ 1, 2, p. 77; C. & M. Dig., §§ 3001-3003; Pope’s Dig., §§ 3823-3825; Acts 1961, No. 454, § 1; A.S.A. 1947, §§ 43-924 — 43-926.

16-85-510. Disclosure of newspaper, periodical, or radio station sources.

Before any editor, reporter, or other writer for any newspaper, periodical, or radio station, or publisher of any newspaper or periodical, or manager or owner of any radio station shall be required to disclose to any grand jury or to any other authority the source of information used as the basis for any article he or she may have written, published, or broadcast, it must be shown that the article was written, published, or broadcast in bad faith, with malice, and not in the interest of the public welfare.

History. Init. Meas. 1936, No. 3, § 15, Acts 1949, No. 254, § 1; A.S.A. 1947, Acts 1937, p. 1384; Pope’s Dig., § 3828; § 43-917.

RESEARCH REFERENCES

Ark. L. Notes. Gitelman and Watkins, No Requiem for Ricarte: Separation of Powers, the Rules of Evidence, and the Rules of Civil Procedure, 1991 Ark. L. Notes 27.

Ark. L. Rev. Act 1949 General Assem-

bly — Act 254 Newspaperman's Privilege Extended to Radio Broadcasters, 3 Ark L. Rev. 374.

UALR L.J. Owen, Survey of Arkansas Law: Civil Procedure, 2 UALR L.J. 177.

CASE NOTES

ANALYSIS

Construction.
Federal subpoena.
Waiver.

Construction.

The use of the words "to any other authority" in this section clearly indicates that the privilege is applicable to civil proceedings and not restricted to criminal proceedings. Saxton v. Arkansas Gazette Co., 264 Ark. 133, 569 S.W.2d 115 (1978).

Federal Subpoena.

Ark. Const., Art. 2, § 6, and this section would not shield a television network from a federal grand jury subpoena to turn over video footage and the transcript of an interview with a witness who re-

fused to testify before the grand jury; state law privileges are inapplicable in such a situation. In re Grand Jury Subpoena ABC, 947 F. Supp. 1314 (E.D. Ark. 1996).

Waiver.

Where a newspaper reporter disclosed, to both her boss and a deputy prosecuting attorney, the name of a supposed anonymous confidential source, which name proved incorrect, with instructions that the name be kept strictly confidential, the privilege provided by this section was not waived. Saxton v. Arkansas Gazette Co., 264 Ark. 133, 569 S.W.2d 115 (1978).

Cited: United States v. Hively, 202 F. Supp. 2d 886 (E.D. Ark. 2002).

16-85-511. Evidence.

The grand jury is not bound to hear evidence for the defendant, but it is their duty to weigh all the evidence before them. If they believe that other evidence will explain away the charge, they should order the evidence to be produced.

History. Crim. Code, § 102; C. & M. Dig., § 2988; Pope's Dig., § 3810; A.S.A. 1947, § 43-918; Acts 2005, No. 1994, § 320.

Amendments. The 2005 amendment

deleted the former first sentence, which read; "The grand jury can receive none but legal evidence," substituted "The grand jury is" for "They are," and deleted "within their reach" following "other evidence."

CASE NOTES

ANALYSIS

Construction.
Sufficiency of indictment.
Testimony of grand juror.

Construction.

This section is merely directory. McDonald v. State, 155 Ark. 142, 244 S.W. 20 (1922).

Sufficiency of Indictment.

An indictment will not be quashed on the ground that the evidence introduced before the grand jury is insufficient to sustain it. State v. Fox, 122 Ark. 197, 182 S.W. 906 (1916).

Testimony of Grand Juror.

The testimony of a grand juror is secondary and hearsay and therefore incom-

petent. *McElroy v. State*, 106 Ark. 131, 152 S.W. 1019 (1913).

Cited: *Simpson v. Langston*, 281 Ark. 458, 664 S.W.2d 872 (1984).

16-85-512. Persons permitted to be present.

No persons except the prosecuting attorney, the court reporter, and the witnesses under examination are permitted to be present while the grand jury is examining a charge, and no person whatever shall be present while the grand jury is deliberating or voting on a charge.

History. Crim. Code, § 108; C. & M. Dig., § 2996; Pope's Dig., § 3818; A.S.A. 1947, § 43-919; Acts 2005, No. 1994, § 273.

Amendments. The 2005 amendment

inserted "court reporter" following "prosecuting attorney."

Cross References. Right to interpreter, § 16-89-104.

CASE NOTES

ANALYSIS

Presence during deliberation.

Presence during examination.

Presence During Deliberation.

A motion to quash an indictment on the grounds that the prosecuting attorney was present and exercised undue influence and forced the jury to return the indictment was properly overruled where the allegation was not sustained by the evidence presented. *Haraway v. State*, 203 Ark. 912, 159 S.W.2d 733, cert. denied, 317 U.S. 648, 63 S. Ct. 42, 87 L. Ed. 521 (1942).

Presence During Examination.

An indictment will not be quashed on account of a stranger being in the grand jury room during the taking of testimony.

Bennett v. State, 62 Ark. 516, 36 S.W. 947 (1896); *Richards v. State*, 108 Ark. 87, 157 S.W. 141 (1913); *Tinner v. State*, 109 Ark. 138, 158 S.W. 1087 (1913).

Presence in the grand jury room during accused's testimony of the police officer in charge of the investigation and his participation in the questioning of accused made it necessary to quash the indictment, even though the accused had said that he had no objection to the officer's presence, since there was no proof that accused knew or was informed of his rights. *Moseley v. State*, 256 Ark. 716, 510 S.W.2d 298 (1974).

Cited: *Bennett v. State*, 161 Ark. 496, 257 S.W. 372 (1923); *Weems v. Anderson*, 257 Ark. 376, 516 S.W.2d 895 (1974); *Simpson v. Langston*, 281 Ark. 458, 664 S.W.2d 872 (1984).

16-85-513. Indictment.

(a) The grand jury should find an indictment when all the evidence before them, taken together, would, in their judgment, if unexplained, warrant a conviction by the trial jury.

(b) All the papers and other matters of evidence relating to the arrest and examination of the charges against persons committed or on bail which have been returned to court by magistrates shall be laid before the grand jury. If, upon investigation, they refuse to find an indictment, they shall write upon some one of the papers "dismissed", with the signature of the foreman. Thereupon, the court shall discharge the defendant from custody if he or she is in jail, or the court shall exonerate the bail if bail has been given, unless the court should be of the opinion that the charge should again be submitted to another grand jury. In that case, the defendant may be continued in custody or on bail until the next term of the court.

(c) The dismissal of the charge does not prevent its being again submitted to a grand jury as often as the court may direct, but without such direction, it cannot again be submitted.

(d) Unless an indictment is found at the term of the court next after the first submission of the charge to the grand jury, the defendant shall be discharged from custody or exonerated from bail unless, for cause shown, the court shall otherwise direct.

History. Crim. Code, §§ 103, 114-116; Dig., §§ 3811, 3819-3821; A.S.A. 1947, C. & M. Dig., §§ 2989, 2997-2999; Pope's §§ 43-920 — 43-923.

CASE NOTES

ANALYSIS

In general.
Dismissal.
Information.

In General.

This section refers to the resubmission of causes by the court and does not prevent a grand jury after a criminal charge has been dismissed from subsequently returning an indictment against the defendant. *Marshall v. State*, 84 Ark. 88, 104 S.W. 934 (1907).

Dismissal.

The finding of an indictment for forgery will not be a dismissal of a charge of

obtaining money under false pretense. *Bingaman v. State*, 181 Ark. 94, 24 S.W.2d 969 (1930).

Information.

The acts of the grand jury with respect to the finding of an indictment are not binding upon the prosecuting attorney with respect to his filing an information, and an information may be filed although the grand jury has investigated the case and refused or failed to find an indictment; this section does not prevent an accusation by information after the grand jury has investigated the charge. *Orsini v. State*, 286 Ark. 283, 691 S.W.2d 175 (1985).

16-85-514. Disclosure of information.

(a) Every member of the grand jury must keep secret whatever the member or any other grand juror may have said, or in what manner he or she or any grand juror may have voted on a matter before them.

(b)(1) No grand juror shall disclose any evidence given before the grand jury except when lawfully required to testify as a witness in relation to the evidence, nor shall he or she disclose the fact of any indictment having been found against any person not in actual confinement until the defendant has been arrested.

(2) Any grand juror violating the provisions of this subsection shall be guilty of a violation and upon conviction shall be fined any sum not exceeding one thousand dollars (\$1,000).

(c)(1) A member of the grand jury, however, may be required by a court to disclose the testimony of a witness examined before the grand jury for the purpose of ascertaining its consistency with the testimony given by the witness on trial, for the purpose of proceeding against the witness for perjury in his or her testimony, or upon the trial of a prosecution of the witness for perjury.

(2) It shall be the duty of the foreman of the grand jury to communicate to the prosecuting attorney, when requested, the substance of the testimony before them.

(d) A grand juror cannot be questioned for anything he or she may say or any vote he or she may give relative to a matter legally before the grand jury, except for a perjury he or she may have committed in making accusation or giving testimony before his or her fellow jurors.

History. Rev. Stat., ch. 45, §§ 75, 76; Crim. Code, §§ 109-111; C. & M. Dig., §§ 2820, 2992-2994; Pope's Dig., §§ 3538, 3814-3816; A.S.A. 1947, §§ 43-927 — 43-931; Acts 2005, No. 1994, § 471.

Amendments. The 2005 amendment

inserted "or she" and "or her" throughout this section; substituted "the member" for "he himself" in (a); and, in (b)(2), substituted "violation" for "misdemeanor" and "one thousand dollars (\$1,000)" for "one hundred dollars (\$100)."

CASE NOTES

ANALYSIS

Evidence.
Vote.

Evidence.

In an action for a malicious prosecution, it was not error to refuse to permit the plaintiff to prove by members of the grand jury what testimony was given by the defendants before the grand jury in the alleged malicious prosecution. *Scott v. Pennington*, 151 Ark. 26, 235 S.W. 375 (1921).

Members of the grand jury were proper parties to maintain action based upon their investigation of facts upon which the complaint was based and they had a legal right to use this information, for even if they did obtain some of their information as jurors, there is no rule or law to prevent them from using it in an action to protect

the public interest. *Goodwin v. State*, 235 Ark. 457, 360 S.W.2d 490 (1962).

Vote.

An indictment cannot be impeached by the testimony of a grand juror that only eleven of their number voted for it. *Nash v. State*, 73 Ark. 399, 84 S.W. 497 (1904); *Nash v. State*, 79 Ark. 120, 95 S.W. 147 (1906).

In a habeas corpus proceeding seeking release on the ground that petitioner was not indicted for burglary but only for robbery, the grand jurors' testimony that they did not vote to indict on both charges was incompetent. *Whitted v. State*, 188 Ark. 11, 63 S.W.2d 283 (1933).

Cited: *Whitted v. State*, 188 Ark. 11, 63 S.W.2d 283 (1933); *Davis v. Circuit Court*, 244 Ark. 142, 424 S.W.2d 149 (1968); *Simpson v. Langston*, 281 Ark. 458, 664 S.W.2d 872 (1984).

16-85-515. Advice of court or prosecuting attorney.

The grand jury may, at all reasonable times, ask the advice of the court or the prosecuting attorney.

History. Crim. Code, § 107; C. & M. Dig., § 2995; Pope's Dig., § 3817; A.S.A. 1947, § 43-932.

CASE NOTES

Secret Charge.

An indictment will not be quashed because the judge entered the grand jury

room and charged the grand jury secretly. *Yelvington v. State*, 169 Ark. 359, 275 S.W. 701 (1925).

16-85-516. Indictment of grand juror.

Any grand juror may be indicted by the grand jury of which he or she is a member, but when any complaint shall be lodged against a grand

juror, the foreman shall inform the prosecuting attorney of the charge. If, on examination, there are grounds for proceedings against the juror, the foreman shall inform the court of these grounds, and the court shall discharge the juror and cause another to be summoned, if necessary.

History. Crim. Code, § 407; Acts 1871, § 3000; Pope's Dig., § 3822; A.S.A. 1947, No. 49, § 1 [407], p. 255; C. & M. Dig., § 43-933.

16-85-517. Special grand jury.

(a) At any time a grand jury is not in session, the court, in its discretion, by order entered of record, may impanel a special grand jury.

(b) When impaneled, the special grand jury shall have all the powers and proceed in all respects as provided by law for the conduct of regular grand juries.

History. Rev. Stat., ch. 45, §§ 71, 72; No. 3, § 33, Acts 1937, p. 1384; Pope's C. & M. Dig., § 3004; Init. Meas. 1936, Dig., § 3826; A.S.A. 1947, § 43-934.

CASE NOTES

ANALYSIS

Indictment by regular jury quashed.

Power of circuit court.

Presumption.

Selection.

Indictment by Regular Jury Quashed.

A special grand jury may be called and may return an indictment against defendant where one has been quashed which had been returned by the regular panel for the term. *Sutton v. State*, 163 Ark. 562, 260 S.W. 409 (1924); *Nicols v. State*, 187 Ark. 999, 63 S.W.2d 655 (1933).

Power of Circuit Court.

The circuit court acting under its inherent constitutional right has the power to direct the sheriff to summon a special grand jury and, when assembled, impanel a special grand jury. *Rowland v. State*, 213

Ark. 780, 213 S.W.2d 370 (1948), cert. denied, 336 U.S. 918, 69 S. Ct. 641, 93 L. Ed. 1081.

Presumption.

Where a special grand jury has been summoned after the discharge of the regular grand jury, it is not necessary for the court to specify the reason for summoning the same in its order and the Supreme Court will presume that the condition existed authorizing such order. *Davis v. State*, 118 Ark. 31, 175 S.W. 1168 (1915).

Selection.

This section does not exempt courts from all legislative control in the matter of selecting special grand juries for such selection still must be made according to the governing statutes. *Streett v. Roberts*, 258 Ark. 839, 529 S.W.2d 343 (1975).

Cited: *Breysacher v. State*, 123 Ark. 101, 184 S.W. 433 (1916).

16-85-518. Experts — Expenses.

Grand juries may employ experts and other professionals to assist in the grand jury investigations if, prior to the employment, the quorum court and county judge approve the employment. In that case, all expenses resulting from the employment shall be paid by the county.

History. Acts 1987, No. 318, § 1.

SUBCHAPTER 6 — PROCESS ON INDICTMENT

SECTION.

- 16-85-601. Definition.
- 16-85-602. Order of court upon indictment.
- 16-85-603. Arrest — Issuance.

SECTION.

- 16-85-604. [Repealed.]
- 16-85-605. [Repealed.]
- 16-85-606. Issuance of bench warrant discretionary.

Cross References. Arrest, citation, summons, and pretrial release generally, ARCrP 4.1 et seq.

RESEARCH REFERENCES

Am. Jur. 41 Am. Jur. 2d, Indict., § 1 et seq. **C.J.S.** 42 C.J.S., Indict., § 1 et seq.

16-85-601. Definition.

As used in this code, unless the context otherwise requires, the “process on an indictment” consists of the writs for arresting or summoning the defendant to appear and answer the indictment.

History. Crim. Code, § 139; C. & M. Dig., § 3039; Pope’s Dig., § 3864; A.S.A. 1947, § 43-1101.

Publisher’s Notes. “This code,” re-

ferred to in this section, means the Code of Practice in Criminal Cases of 1869. See parallel reference tables in the tables volume.

16-85-602. Order of court upon indictment.

Upon an indictment’s being found, if the defendant is not in custody or on bail the court shall forthwith make an order for process to be issued on the indictment, designating whether it shall be for arresting or summoning the defendant.

History. Crim. Code, § 141; C. & M. Dig., § 3041; Pope’s Dig., § 3867; A.S.A. 1947, § 43-1103; Acts 2005, No. 1994, § 321.

Amendments. The 2005 amendment

deleted “and, if it is for arresting the defendant and the offense charged is bailable, the sum in which he may be admitted to bail shall be fixed” from the end of this section.

CASE NOTES

ANALYSIS

Construction.
Applicability.

Construction.

This statute is directory merely. State

ex rel. Nixon v. Grace, 98 Ark. 505, 136 S.W. 670 (1911).

Applicability.

This section does not apply when the prosecution is by information. Beckwith v. State, 238 Ark. 196, 379 S.W.2d 19 (1964).

16-85-603. Arrest — Issuance.

(a) The process of arrest shall be issued by the clerk upon the order of the court and may be reissued from time to time by order of the prosecuting attorney.

(b) The process of arrest on an indictment shall be a bench warrant.

(c) A bench warrant may be substantially in the following form:

“Circuit Court — State of Arkansas.

To any Law Enforcement Officer of the State:

You are hereby commanded forthwith to arrest A. B., and bring him or her as provided by law before the _____ Circuit Court, to answer an indictment found in that court against him or her for felony, (or misdemeanor, as the case may be) or, if the court be adjourned for the term, that you deliver him or her as provided by law to the custody of the jailer of (_____) County.

Given under my hand and seal of said court this _____ day of _____, 20____.

C.D., Clerk, ____ C. C.”

History. Crim. Code, §§ 140, 142, 143; C. & M. Dig., §§ 3040, 3042; Pope’s Dig., §§ 3866, 3868; A.S.A. 1947, §§ 43-1102, 43-1104, 43-1105; Acts 2005, No. 1994, § 252.

Amendments. The 2005 amendment, in (c), substituted “Law Enforcement Officer of” for “Sheriff, Coroner, Jailer, Constable, Marshal, or Policeman in” and inserted “or her” three times.

CASE NOTES**ANALYSIS**

Bench warrant.
Time of trial.

Bench Warrant.

The ordinary bench warrant is directed to any sheriff, coroner, jailer, constable, marshal or policeman in the state. *Winkler v. State*, 32 Ark. 539 (1877).

It is not a defense that the state failed to show that the court made an order for

issuance of a bench warrant, as it is not proper that the order be entered of record and thereby open to public inspection. *Humphries v. State*, 33 Ark. 713 (1878).

Time of Trial.

A defendant, if arrested on a bench warrant, may be tried at the same term at which he is indicted. *Shipley v. State*, 50 Ark. 49, 6 S.W. 226 (1887).

16-85-604. [Repealed.]

Publisher’s Notes. This section, concerning arrest and bail, was repealed by Acts 2005, No. 1994, No. 498. The section was derived from Crim. Code, §§ 144-146;

C. & M. Dig., §§ 3043-3045; Pope’s Dig., §§ 3869-3871; A.S.A. 1947, §§ 43-1106 — 43-1108.

16-85-605. [Repealed.]

Publisher’s Notes. This section, concerning the summons, was repealed by Acts 2005, No. 1994, § 505. The section was derived from Crim. Code, §§ 147-149;

C. & M. Dig., §§ 3046-3048; Pope’s Dig., §§ 3872-3874; A.S.A. 1947, §§ 43-1109 — 43-1111.

16-85-606. Issuance of bench warrant discretionary.

(a) The court may, at its discretion, order a bench warrant to be issued on any indictment.

(b) However, where the punishment is limited to a fine of one hundred dollars (\$100) or less, a bench warrant shall not be issued unless the court is satisfied that there is reason to believe the defendant will escape punishment if a bench warrant is not issued.

History. Crim. Code, § 150; C. & M. Dig., § 3049; Pope's Dig., § 3875; A.S.A. 1947, § 43-1112.

SUBCHAPTER 7 — ARRAIGNMENT AND PLEADING GENERALLY

SECTION.

16-85-701. Definition.

16-85-702. Arraignment for felonies and misdemeanors — Exception.

16-85-703 — 16-85-705. [Repealed.]

16-85-706. Motion to set aside indictment.

SECTION.

16-85-707, 16-85-708. [Repealed.]

16-85-709. Pleas generally.

16-85-710, 16-85-711. [Repealed.]

16-85-712. [Repealed.]

16-85-713. Leave of court to enter nolle prosequi.

Cross References. Arrest, citation, summons, and pretrial release generally, ARCrP 4.1 et seq.

Plea discussions and plea agreements, ARCrP 25.1 et seq.

Rights of accused, Ark. Const., Art. 2, § 10.

Right to interpreter, § 16-89-104.

Effective Dates. Acts 1891, No. 59, § 4; effective on passage.

Acts 1897, No. 22, § 3; effective on passage.

Acts 1965, No. 92, § 5: Feb. 18, 1965. Emergency clause provided: "It has been found and is declared by the General Assembly that prosecutions by this State, or its governmental subdivisions, or persons for offenses against this State, or a governmental subdivision thereof, com-

mitted in the same course of conduct which resulted in the commission of an offense of the same character by the person against the United States, or against another State or Territory thereof, of which such person has been formerly acquitted or convicted, on the merits, subject such persons to needless and unjust harassment and are contrary to the spirit of constitutional guarantees against double jeopardy; that there is urgent need to prevent such injustices; and that enactment of this bill will provide the needed remedy. Therefore, an emergency is declared to exist, and this act, being necessary for the preservation of the public peace, health, and safety, shall take effect and be in force from the date of its approval."

RESEARCH REFERENCES

ALR. Adequacy of defense counsel's representation of criminal client regarding right to and incidents of jury trial. 3 ALR 4th 601.

Adequacy of defense counsel's representation of criminal client regarding plea bargaining. 8 ALR 4th 660.

Adequacy of defense counsel's represen-

tation of criminal client regarding guilty plea. 10 ALR 4th 8.

Judge's participation in negotiations as rendering guilty plea involuntary. 10 ALR 4th 689.

Right of prosecutor to withdraw from plea bargain prior to entry of plea. 16 ALR 4th 1089.

Stipulation allegedly amounting to guilty plea in state criminal trial. 17 ALR 4th 61.

Sufficiency of court's statement, before accepting plea of guilty, as to waiver of right to jury trial being a consequence of such plea. 23 ALR 4th 251.

Delay in arraignment as affecting admissibility of confession or other state-

ment made by defendant. 28 ALR 4th 1121.

Power or duty of state court, which has accepted guilty plea, to set aside such plea on its own initiative prior to sentencing or entry of judgment. 31 ALR 4th 504.

Am. Jur. 21 Am. Jur. 2d, Crim. L., § 433 et seq.

C.J.S. 22 C.J.S., Crim. L., § 406 et seq.

CASE NOTES

ANALYSIS

Error in procedure.

Presence of defendant.

Waiver.

Error in Procedure.

This subchapter provides simple and proper procedures to bring the defendant to the bar of justice, to ascertain his defense, and put the case at issue and should be followed; but the Supreme Court will not reverse a conviction unless the error has been prejudicial. *Hobbs v. State*, 86 Ark. 360, 111 S.W. 264 (1908).

Presence of Defendant.

Though the record must affirmatively show the presence of the defendant in each substantive step of the trial, where the language of the record is ambiguous, it should be interpreted in the strongest sense to which it is susceptible in favor of

the court's judgment. *Duncan v. State*, 110 Ark. 523, 162 S.W. 573 (1913).

Waiver.

If the accused voluntarily pleads to indictment without being formally arraigned, and the court accepts the plea, there is an implied waiver of his right to hear the indictment read. *Ransom v. State*, 49 Ark. 176, 4 S.W. 658 (1887).

Where no prejudice appears upon the record, a conviction of a felony will not be set aside because the accused was tried without arraignment or plea, if the cause was treated as at issue upon a plea of not guilty. *Hayden v. State*, 55 Ark. 342, 18 S.W. 239 (1892).

Where defendant announced through his counsel that he was ready for trial, he waived his statutory right to be formally arraigned and to have the indictment read to him. *Hill v. State*, 251 Ark. 370, 472 S.W.2d 722 (1971).

16-85-701. Definition.

As used in this code, unless the context otherwise requires, an arraignment is the reading of the indictment to the defendant and the asking of him or her if he or she pleads guilty or not guilty to the indictment.

History. Crim. Code, § 155; C. & M. Dig., § 3050; Pope's Dig., § 3876; A.S.A. 1947, § 43-1201; Acts 2005, No. 1994, § 274.

Publisher's Notes. "This code," referred to in this section, means the Code of

Practice in Criminal Cases of 1869. See parallel reference tables in the tables volume.

Amendments. The 2005 amendment deleted "by the clerk" following "indictment" and inserted "or her" and "or she."

CASE NOTES

Cited: *Davidson v. State*, 108 Ark. 191, 158 S.W. 1103 (1913); *Mitchell v. Stephens*, 353 F.2d 129 (8th Cir. 1965); *Nance*

v. State, 323 Ark. 583, 918 S.W.2d 114 (1996), cert. denied, 519 U.S. 847, 117 S. Ct. 134, 136 L. Ed. 2d 83 (1996).

16-85-702. Arraignment for felonies and misdemeanors — Exemption.

The arraignment shall only be made in indictments for felonies and misdemeanors and may be dispensed with by the court, with the defendant's consent.

History. Crim. Code, § 156; C. & M. Dig., § 3054; Pope's Dig., § 3880; A.S.A. 1947, § 43-1202; Acts 2005, No. 1994, § 295.

Amendments. The 2005 amendment

substituted "felonies and misdemeanors" for "felony."

Cross References. Prompt first appearance, ARCrP 8.1.

RESEARCH REFERENCES

Ark. L. Notes. Malone, The Availability of a First Appearance and Preliminary Hearing, 1983 Ark. L. Notes 41.

CASE NOTES**Misdemeanor.**

In a trial of a misdemeanor in the circuit court on appeal from a justice of the peace, it was unnecessary to arraign the defendant since arraignment is only necessary when the accused is tried on indictment. *Mayfield v. State*, 160 Ark. 474, 254 S.W. 841 (1923).

Cited: *Mitchell v. Stephens*, 353 F.2d 129 (8th Cir. 1965); *Nance v. State*, 323 Ark. 583, 918 S.W.2d 114 (1996), cert. denied, 519 U.S. 847, 117 S. Ct. 134, 136 L. Ed. 2d 83 (1996).

16-85-703 — 16-85-705. [Repealed.]

Publisher's Notes. These sections, concerning prearraignment and arraignment, were repealed by Acts 2005, No. 1994, § 506. The sections were derived from the following sources:

16-85-703. Rev. Stat., ch. 45, § 112; C. & M. Dig., § 3051; Pope's Dig., § 3877; A.S.A. 1947, § 43-1203.

16-85-704. Rev. Stat., ch. 45, §§ 110, 111; C. & M. Dig., §§ 3052, 3053; Pope's Dig., §§ 3878, 3879; A.S.A. 1947, §§ 43-1204, 43-1205.

16-85-705. Crim. Code, § 158; C. & M. Dig., § 3056; Pope's Dig., § 3882; A.S.A. 1947, § 43-1206.

16-85-706. Motion to set aside indictment.

(a) The motion to set aside the indictment can only be made on the following grounds:

(1) A substantial error in the summoning or formation of the grand jury;

(2) That some person other than the grand jurors was present before the grand jury when they finally acted upon the indictment; and

(3) That the indictment was not found and presented as required by this code.

(b) If the motion is sustained, the court shall make an order that the case be submitted to another grand jury to be assembled at that or the next term of the court.

History. Crim. Code, §§ 159-162; C. & M. Dig., §§ 3057-3060; Pope's Dig., §§ 3883-3886; A.S.A. 1947, §§ 43-1207—43-1210; Acts 2005, No. 1994, § 322.

Publisher's Notes. "This code," referred to in this section, means the Code of Practice in Criminal Cases of 1869. See parallel reference tables in the tables volume.

Amendments. The 2005 amendment added "and" at the end of (a)(2); deleted "The defendant, if in custody, shall be remanded to jail, or if he is on bail, the bail shall be liable for the defendant's appearance to answer a new indictment, if one is found" at the end of (b); and deleted former (c) and (d).

CASE NOTES

ANALYSIS

Deficiency in indictment or information. Grounds.

—Formation of jury.

—Presentment.

Reindictment.

Time for objection.

Waiver.

Deficiency in Indictment or Information.

Where an indictment or information may be deficient, that deficiency can be corrected by supplying the defendant with a bill of particulars, or other facts detailing the elements of the charge; the defendant may be sufficiently informed of the charges through supporting affidavits. *Meny v. State*, 314 Ark. 158, 861 S.W.2d 303 (1993).

Grounds.

It is no defense that former prosecuting attorney agreed to dismiss prosecution. *Dillard v. State*, 65 Ark. 404, 46 S.W. 533 (1898).

An indictment will not be quashed on the ground that the evidence introduced before the grand jury was insufficient to sustain it. *State v. Fox*, 122 Ark. 197, 182 S.W. 906 (1916); *Murphy v. State*, 171 Ark. 620, 286 S.W. 871 (1926).

It is not proper to quash an indictment because of the character or quantum of evidence before the grand jury. *McDonald v. State*, 155 Ark. 142, 244 S.W. 20 (1922).

An indictment will not be quashed because the judge entered the jury room and charged the grand jury secretly. *Yelvington v. State*, 169 Ark. 498, 276 S.W. 353 (1925).

Motion to quash indictment on ground that it is not direct and certain as to the offense charged, that it is repugnant in the description of the offense, that it is

duplex, that it is based on a statute originating a crime unknown to the common law, that it is not in the language of the statute or fully descriptive of the offense charged in the statute, was properly overruled, since those grounds could not be raised by motion to quash. *Matz v. State*, 196 Ark. 97, 116 S.W.2d 604 (1938).

—Formation of Jury.

It is irregular for the court to designate by name particular persons among the bystanders to complete the grand jury; but such irregularity would not invalidate all the proceedings of the grand jury, and is not sufficient ground for setting aside the indictment. *Runnels v. State*, 28 Ark. 121 (1872).

—Presentment.

The objection that the record does not show that the indictment was returned into court by the grand jury cannot be raised on appeal for the first time. *Shinn v. State*, 93 Ark. 290, 124 S.W. 263 (1910).

Reindictment.

Where an indictment presented by the regular grand jury had been set aside after the grand jury had been discharged, it was not an abuse of discretion to cause a special grand jury at the same term to be summoned to consider the charge against the defendant. *Sutton v. State*, 163 Ark. 562, 260 S.W. 409 (1924).

Time for Objection.

The proper time to object to the sufficiency of an indictment or information is prior to trial. *Meny v. State*, 314 Ark. 158, 861 S.W.2d 303 (1993); *Sawyer v. State*, 327 Ark. 421, 938 S.W.2d 843 (1997).

An objection to the form or sufficiency of an information must be made prior to trial. *Ingram v. State*, 48 Ark. App. 105, 891 S.W.2d 805 (1995).

Waiver.

When the grand jury has been impaneled and the indictment returned by them into court, irregularities in summoning or impaneling them and questions as to the qualifications of the jurors are waived by a plea of not guilty to the indictment. *Shropshire v. State*, 12 Ark. 190 (1851); *Fenalty v. State*, 12 Ark. 630 (1852); *Brown v. State*, 13 Ark. 96 (1852); *Stewart v. State*,

13 Ark. 720 (1853); *Straughan v. State*, 16 Ark. 37 (1855); *Dixon v. State*, 29 Ark. 165 (1874); *Miller v. State*, 40 Ark. 488 (1883); *Wright v. State*, 42 Ark. 94 (1883).

Cited: *Rowland v. State*, 213 Ark. 780, 213 S.W.2d 370 (1948); *Prince v. State*, 304 Ark. 692, 805 S.W.2d 46 (1991); *Nance v. State*, 323 Ark. 583, 918 S.W.2d 114 (1996), cert. denied, 519 U.S. 847, 117 S. Ct. 134, 136 L. Ed. 2d 83 (1996).

16-85-707, 16-85-708. [Repealed.]

Publisher's Notes. These sections, concerning demurrer or plea generally, were repealed by Acts 2005, No. 1994, § 507. The sections were derived from the following sources:

16-85-707. *Crim. Code*, §§ 163, 164, 179, 180; *C. & M. Dig.*, §§ 3064, 3065, 3080,

3081; *Pope's Dig.*, §§ 3890, 3891, 3906, 3907; *Acts* 1953, No. 141, § 1; *A.S.A.* 1947, §§ 43-1211, 43-1212, 43-1228, 43-1229.

16-85-708. *Crim. Code*, §§ 165-171; *C. & M. Dig.*, §§ 3066-3072; *Pope's Dig.*, §§ 3892-3898; *A.S.A.* 1947, §§ 43-1213 — 43-1219.

16-85-709. Pleas generally.

There are but three (3) kinds of pleas to an indictment or information:

- (1) A plea of guilty;
- (2) A plea of *nolo contendere*; or
- (3) A plea of not guilty.

History. *Crim. Code*, § 172; *C. & M. Dig.*, § 3074; *Pope's Dig.*, § 3900; *Acts* 1953, No. 141, § 1; *A.S.A.* 1947, § 43-1220; *Acts* 2005, No. 1994, § 323.

Amendments. The 2005 amendment substituted "three (3)" for "four (4)" in the introductory language; and deleted former (4).

RESEARCH REFERENCES

Ark. L. Rev. *Plea of Nolo Contendere in a Criminal Action*, 7 Ark. L. Rev. 337.

CASE NOTES**Order of Trying Pleas.**

Where defendant pleads former acquittal, and not guilty, the plea of former acquittal should be first tried. *Lee v. State*, 26 Ark. 260 (1870).

Cited: *Ex parte Hornsby*, 228 Ark. 975, 311 S.W.2d 529 (1958).

16-85-710, 16-85-711. [Repealed.]

Publisher's Notes. These sections, concerning pleas of guilty and not guilty, were repealed by Acts 2005, No. 1994, § 508. The sections were derived from the following sources:

16-85-710. *Crim. Code*, §§ 173, 174; *C.*

& M. Dig., §§ 3075, 3076; *Pope's Dig.*, §§ 3901, 3902; *A.S.A.* 1947, §§ 43-1221 — 43-1222.

16-85-711. *Crim. Code*, § 175; *C. & M. Dig.*, § 3077; *Pope's Dig.*, § 3903; *A.S.A.* 1947, § 43-1223.

16-85-712. [Repealed.]

Publisher's Notes. This section, concerning pleas of former acquittal or conviction, was repealed by Acts 2005, No. 1994, § 509. The section was derived from Crim. Code, §§ 176-178; Acts 1891, No.

59, § 3, p. 96; 1897, No. 22, § 2, p. 29; C. & M. Dig., §§ 2883, 3073, 3078, 3079, 3311; Pope's Dig., §§ 3699, 3899, 3904, 3905, 4159; Acts 1965, No. 92, §§ 1-4; A.S.A. 1947, §§ 43-1224 — 43-1227.

16-85-713. Leave of court to enter nolle prosequi.

No prosecuting attorney shall enter a nolle prosequi on any indictment or in any other way discontinue or abandon the indictment without the leave of the court in which the indictment is pending and without being first entered on the docket.

History. Rev. Stat., ch. 45, § 109; C. & M. Dig., § 3061; Pope's Dig., § 3887; A.S.A. 1947, § 43-1230; Acts 2005, No. 1994, § 275.

Amendments. The 2005 amendment deleted "minutes" preceding "docket."

CASE NOTES

ANALYSIS

Agreement to dismiss.
Discretion of court.

Agreement to Dismiss.

It is no defense that a former prosecuting attorney agreed to dismiss prosecution. Dillard v. State, 65 Ark. 404, 46 S.W. 533 (1898).

Discretion of Court.

The trial judge is vested with discretion as to the entry of a nolle prosequi of charges pending before him. Noland v. State, 265 Ark. 764, 580 S.W.2d 953 (1979).

Cited: Rowland v. State, 213 Ark. 780, 213 S.W.2d 370 (1948); Hammers v. State, 261 Ark. 585, 550 S.W.2d 432 (1977).

CHAPTER 86
INSANITY DEFENSE

SECTION.

- 16-86-101. Plea of insanity not to prevent timely trial.
- 16-86-102. Examination and observation generally.
- 16-86-103. Examination and observation.
- 16-86-104. Admission to State Hospital — Report.
- 16-86-105. Examination and observation — Costs.
- 16-86-106. Testimony of mental health examiners.
- 16-86-107. Request for examination upon

SECTION.

- defense of insanity for felony charge.
- 16-86-108. Plea of insanity when period before trial short or insanity alleged after charge.
- 16-86-109. [Repealed.]
- 16-86-110. Insufficient time to submit report to court.
- 16-86-111. Allegation of insanity of convicted defendant.
- 16-86-112. Escape of committed person.
- 16-86-113. Authority of court in vacation.

Publisher's Notes. Acts 1971, No. 433, § 1, provided that it was the specific intent of the codification of the mental health laws contained in the act to only

affect those laws pertaining to mental health.

Acts 1971, No. 433, § 1 provided: "It is hereby found and determined by the Gen-

eral Assembly that the laws relating to the State Hospital, mental health, and mentally ill persons have been enacted piecemeal over a period of many years and that a great number of these laws are duplicating, conflicting, outmoded, and in urgent need of clarification and codification. It is the purpose and intent of the General Assembly in enacting this Act to clarify, update, and codify the various laws of the State relating to the State Hospital, mental health, and mentally ill persons."

Acts 1971, No. 433, ch. 10, § 1, provided: "It is the specific intent of the codification of the mental health laws contained in this Act to only effect those laws pertaining to mental health. Nothing in this Act shall be deemed to repeal or modify the provisions of Act 411 of 1955. No other laws shall be affected in any manner, nor shall the inclusion of such laws within this code in any way repeal or affect those laws as they otherwise apply."

RESEARCH REFERENCES

ALR. Bifurcated trial: necessity or propriety on issue of insanity defense. 1 ALR 4th 884.

Adequacy of defense counsel's representation of criminal client regarding incompetency, insanity, and related issues. 2 ALR 4th 27; 17 ALR 4th 575.

Conditions imposed when releasing person committed to institution as consequence of acquittal of crime on ground of insanity. 2 ALR 4th 934.

Right of accused in criminal prosecution to presence of counsel at court-appointed or approved psychiatric examination. 3 ALR 4th 910.

Mental abnormality of accused as affecting voluntariness of confession. 8 ALR 4th 16.

Criminal responsibility test. 9 ALR 4th 526.

Venue in bribery cases where crime is committed partly in one county and partly in another. 11 ALR 4th 704.

In personam or territorial jurisdiction of state court in connection with obscenity prosecution of author, actor, photographer, publisher, distributor, or other party whose acts were performed outside the state. 16 ALR 4th 1318.

Competency to stand trial of criminal

Cross References. Arrest and detention of insane persons before commitment, § 20-47-104.

Effective Dates. Acts 1971, No. 433, ch. 10, § 4: Mar. 29, 1971. Emergency clause provided: "It is hereby found and determined by the General Assembly that the various mental health laws have been enacted over a period of one hundred years and are not properly organized so that they can be easily found; that many of these laws are antiquated and archaic and are in great need of updating in order to be useful; that the mental health laws need to be placed in a comprehensive code for easy reference by those persons interested in and who use these laws; and that only by the immediate passage of this Act can this be achieved. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall become effective from and after its passage and approval."

defendant diagnosed as "mentally retarded". 23 ALR 4th 493.

Jurisdiction of state court to try criminal defendant brought within jurisdiction illegally or as result of fraud or mistake. 25 ALR 4th 157.

Automatism or unconsciousness as defense to criminal charge. 27 ALR 4th 1067.

Competency to stand trial of criminal defendant diagnosed as "schizophrenic". 33 ALR 4th 1062.

Computer analysis of defendant's mental state. 37 ALR 4th 510.

Forum state's jurisdiction over nonresident defendant in action based on obscene or threatening telephone call from out of state. 37 ALR 4th 852.

Am. Jur. 21 Am. Jur. 2d, Crim. L., § 46 et seq.

Ark. L. Rev. Criminal Law — Mental Disease as a Defense, 9 Ark. L. Rev. 59.

Financial Responsibility for an Accused Committed to the State Hospital for Observation, 9 Ark. L. Rev. 403.

Criminal Law — Insanity — Burden of Proof, 20 Ark. L. Rev. 398.

Criminal Law — Pre-Trial Psychiatric Examination When Issue of Insanity Is Not Raised by the Accused, 23 Ark. L. Rev. 493.

Hospitalization of the Mentally Ill Defendant in Arkansas, 24 Ark. L. Rev. 19.

Criminal Procedure: A Survey of Arkansas Law and the American Bar Association's Standards, 26 Ark. L. Rev. 169.

Criminal Procedure — Pate v. Robinson Applied in Arkansas, 28 Ark. L. Rev. 162.

Recent Developments: Criminal Law: Placing Burden of Proof on Defendant to Show Issue of Insanity Found Constitutional, 33 Ark. L. Rev. 433.

C.J.S. 22 C.J.S., Crim. L., § 56 et seq.

CASE NOTES

ANALYSIS

Construction.

Expert psychiatrists.

Illiteracy.

Pleading.

Presence of defendant.

Venue.

Construction.

Former similar law was mandatory, but before a defendant could invoke the mandate he was to bring himself within its provisions. *Whittington v. State*, 197 Ark. 571, 124 S.W.2d 8 (1939) (decision under prior law).

Expert Psychiatrists.

With respect to the question of a defendant's sanity at the time an offense was committed and competency to stand trial, the statutorily provided review by a state hospital is sufficient; the defendant is not entitled to funds to hire his own expert psychiatrists. *Sanders v. State*, 308 Ark. 178, 824 S.W.2d 353 (1992).

Illiteracy.

Illiteracy did not mean insanity and did not constitute a defense to crime or render a confession of guilt inadmissible in evidence against accused. *Mitchell v. State*, 206 Ark. 149, 174 S.W.2d 241 (1943) (decision under prior law).

Pleading.

Plea of insanity at time of trial was not barred by pleading insanity at the time of the commission of the crime. *Ince v. State*, 77 Ark. 418, 88 S.W. 818 (1905); *Johnson v. State*, 97 Ark. 131, 133 S.W. 596 (1911) (preceding decisions under prior law).

Presence of Defendant.

Where defendant was not present for the hearing on his pretrial motion for a continuance and for his commitment to the Arkansas State Hospital for a mental examination, defendant's absence was not prejudicial, since defendant's trial counsel testified at the ARCrP 37 hearing that nothing during the trial surprised him and that he did not know of anything else he could have done in preparation for the trial even if the continuance had been granted. *Bell v. State*, 296 Ark. 458, 757 S.W.2d 937 (1988).

Venue.

The accused on sanity hearing was entitled to a change of venue as in other cases. *Howard v. State*, 58 Ark. 229, 24 S.W. 8 (1893); *State v. Helm*, 69 Ark. 167, 61 S.W. 915 (1901); *Dewein v. State*, 120 Ark. 302, 179 S.W. 346 (1915); *Bell v. State*, 120 Ark. 530, 180 S.W. 186 (1915) (preceding decisions under prior law).

16-86-101. Plea of insanity not to prevent timely trial.

Nothing in this chapter shall be construed to prevent a trial of a defendant after an order for observation and examination has been entered.

History. Acts 1971, No. 433, ch. 6, § 5; A.S.A. 1947, § 43-1308; Acts 2001, No. 1551, § 1.

Amendments. The 2001 amendment

deleted "at at adjourned day or special term of court prior to the next regular term of court" following "defendant" and substituted "has" for "shall have."

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Practice, Procedure, and Courts, 24 UALR L.J. 523.

CASE NOTES**Construction.**

This section merely permitted a trial prior to the next regular term, in order to minimize motions for observation by defendants as a dilatory move; it did not

require one. *Campbell v. State*, 265 Ark. 77, 576 S.W.2d 938 (1979).

Cited: *Ellingburg v. Lockhart*, 397 F. Supp. 771 (E.D. Ark. 1975).

16-86-102. Examination and observation generally.

(a)(1) Whenever a prosecution for any crime has been instituted in the circuit court by indictment or information, the court, subject to the provisions of §§ 5-2-304 and 5-2-311, shall immediately suspend all further proceedings in the prosecution if:

(A) The defendant files notice that he or she intends to rely upon the defense of mental disease or defect; or

(B) There is reason to believe that mental disease or defect of the defendant will or has become an issue in the case;

(C) The defendant files notice that he or she will put in issue his or her fitness to proceed; or

(D) There is reason to doubt his or her fitness to proceed.

(2) If a trial jury has been impaneled, the court may retain the jury or declare a mistrial and discharge the jury.

(3) A discharge of the jury shall not be a bar to future prosecution.

(b)(1) Upon the issuance of an order for the examination and observation of the defendant, the court shall direct the circuit clerk to notify the prosecuting attorney and the counsel for the defendant of the issuance of the order.

(2)(A) The action of the court in ordering that the defendant undergo examination and observation shall not preclude the state or the defendant from calling expert witnesses to testify at the trial.

(B) The expert witness shall have free access to the defendant for the purpose of observation and examination when the defendant is in the custody of local, county, or state law enforcement or state mental health facilities.

History. Acts 1971, No. 433, ch. 6, § 7; 1973, No. 95, § 1; 1983, No. 191, § 1; A.S.A. 1947, § 43-1301; Acts 2001, No. 1551, § 2.

Amendments. The 2001 amendment rewrote this section.

Cross References. Access to defendant by examiners of his choice, § 5-2-306.

CASE NOTES

ANALYSIS

Purpose.

Appeal.

Commitment to hospital.

Denial of examination.

Discretion of court.

Jury question.

Purpose.

Purpose of former similar section was to have the accused, whose sanity was questioned, examined in advance of his trial by competent, impartial and disinterested physicians, who would make a report upon the sanity of the accused, subject to the right of either the prosecution or defense to have the physicians who prepared the report summoned as witnesses at the trial for examination and cross-examination. *Jones v. State*, 204 Ark. 61, 161 S.W.2d 173 (1942) (decision under prior law).

Appeal.

The Supreme Court could not, on appeal, direct an inquiry into defendant's sanity. *O'Neal v. State*, 111 Ark. 42, 163 S.W. 793 (1914) (decision under prior law).

Commitment to Hospital.

Confinement in jail rather than commitment to state hospital was not ground for reversal of conviction so long as the accused, pleading insanity, was given a prompt and impartial examination by a competent psychiatrist. *Chitwood v. State*, 210 Ark. 367, 196 S.W.2d 241 (1946) (decision under prior law).

This section does not require a defendant to be sent to the hospital until after a plea of insanity. *Kozal v. State*, 264 Ark. 587, 573 S.W.2d 323 (1978).

Denial of Examination.

Defendant's conviction was required to be set aside where the state trial court arbitrarily denied defendant's attempts to avail himself of the established state procedures whereby a mental examination at the state hospital could be obtained. *Ellingburg v. Lockhart*, 397 F. Supp. 771 (E.D. Ark. 1975).

Where the record did not indicate that the trial court was ever apprised of the results of the asserted incomplete psychiatric examination, the trial court did not

abuse its discretion by refusing a continuance for psychiatric examination. *Derrick v. State*, 259 Ark. 316, 532 S.W.2d 431 (1976).

The trial court did not abuse its discretion in failing to direct defendant to undergo further psychiatric observation, where defendant had been psychologically evaluated in compliance with this section. *Clark v. State*, 260 Ark. 479, 541 S.W.2d 683 (1976).

Where the defendant was examined at both the state hospital and a regional mental health facility, the court did not err in refusing to retain a private psychiatrist for the defendant at state expense. *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986).

Discretion of Court.

Overruling motion to set aside judgment entered on plea of guilty and allowing defendant to enter a plea of insanity and ordering him taken to state penitentiary to serve sentence, following report of examination made by State Hospital pursuant to judge's order, was not abuse of discretion. *Gunter v. State*, 202 Ark. 551, 151 S.W.2d 85 (1941) (decision under prior law).

The court did not have discretion to deny defendant's motion for examination and a denial was erroneous. *Lambert v. State*, 213 Ark. 567, 211 S.W.2d 431 (1948) (decision under prior law).

While in certain instances the trial court could commit a defendant to the state hospital for mental examination, it had no authority to appoint a commission to make an examination. *Green v. State*, 222 Ark. 308, 259 S.W.2d 142 (1953) (decision under prior law).

Where necessary for the administration of justice if issue of insanity was raised after trial had commenced, court had discretion to declare a mistrial and commit a defendant to the State Hospital for observation. *Cody v. State*, 237 Ark. 15, 371 S.W.2d 143 (1963) (decision under prior law).

Jury Question.

Court did not deprive defendant of due process by failing to give him a preliminary hearing as to competency to stand trial, but where the court was aware that

defendant was claiming mental incompetency to stand trial, it was error not to submit the issue to the jury. *Bumgarner v. Lockhart*, 361 F. Supp. 829 (E.D. Ark. 1973).

Cited: *Murphy v. State*, 255 Ark. 861, 504 S.W.2d 748 (1974); *Rodgers v. State*, 261 Ark. 293, 547 S.W.2d 419 (1977); *Andrews v. State*, 265 Ark. 390, 578 S.W.2d

585 (1979); *Arkansas State Hosp. v. Cleburne County*, 271 Ark. 94, 607 S.W.2d 61 (1980); *Coley v. Clinton*, 635 F.2d 1364 (8th Cir. 1980); *Arkansas State Hosp. v. Goslee*, 274 Ark. 168, 623 S.W.2d 513 (1981); *Dunn v. State*, 291 Ark. 131, 722 S.W.2d 595 (1987); *Randleman v. State*, 310 Ark. 411, 837 S.W.2d 449 (1992).

16-86-103. Examination and observation.

(a) If the court orders the defendant to undergo examination and observation, the examination and observation of the defendant shall be made by:

(1) A licensed psychiatrist who:

(A) Has successfully completed either:

(i) A post-residency fellowship in forensic psychiatry accredited by the American Board of Psychiatry and Neurology; or

(ii) A forensic certification course approved by the Department of Health and Human Services; and

(B) Is currently approved by the department to administer forensic examinations; or

(2) A licensed psychologist who has either:

(A)(i) Received a post-doctoral diploma in forensic psychology accredited by the American Board of Professional Psychology; or

(ii) Successfully completed a forensic certification course approved by the department; and

(B) Is currently approved by the department to administer forensic examinations.

(b)(1) Upon completion of the examination at a local mental health clinic or center, the court may commit the defendant to the Arkansas State Hospital for further examination and observation if the court determines in its sole discretion that the further examination and observation is warranted.

(2) The psychiatrist or the psychologist who examined and observed the defendant shall make a written report to the court and shall indicate:

(A) A description of the nature of the examination;

(B) A substantiated diagnosis in the terminology of the American Psychiatric Association's current edition of the Diagnostic and Statistical Manual;

(C) An opinion on whether the defendant, as a consequence of mental disease or defect, lacks the capacity to understand the proceedings against him or her and to assist effectively in his or her own defense;

(D) A description of any evidence that the defendant is feigning signs and symptoms of mental disease or defect;

(E)(i) When directed by the court, an opinion as to the extent, if any, to which the capacity of the defendant to appreciate the crimi-

nality of his or her conduct or to conform his or her conduct to the requirements of law was impaired at the time of the conduct alleged.

(ii) This opinion shall also include a description of the reasoning used by the examiner to support the examiner's opinion;

(F) When directed by the court, an opinion as to the capacity of the defendant to have the culpable mental state that is required to establish an element of the offense charged;

(G) The signs and symptoms of mental disease or defect that led to the opinion on the presence of mental disease or defect; and

(H) The evidence that supports the opinion of the examiner on the capacity of the defendant to:

(i) Understand the proceedings against him or her; and

(ii) Assist in his or her own defense.

History. Acts 1971, No. 433, ch. 6, § 7; 1973, No. 95, § 1; 1983, No. 191, § 1; A.S.A. 1947, § 43-1301; Acts 2001, No. 1551, § 3.

Amendments. The 2001 amendment rewrote this section.

CASE NOTES

Evidence.

Doctor's testimony and reports held to be competent evidence. *Poole v. State*, 212 Ark. 746, 207 S.W.2d 725 (1948) (decision under prior law).

Cited: *Dunn v. State*, 291 Ark. 131, 722 S.W.2d 595 (1987).

16-86-104. Admission to State Hospital — Report.

(a) If the Director of the Division of Mental Health Services of the Department of Health and Human Services determines that a defendant should be admitted to the Arkansas State Hospital for examination and observation, the defendant shall be committed to the Arkansas State Hospital for a period not exceeding one (1) month or until a time as the Director of the Division of Mental Health Services believes is necessary for the examination and observation of the defendant.

(b) The qualified psychiatrist or qualified psychologist who is designated to examine and observe the mental condition of the defendant shall prepare a written report indicating separately the defendant's mental condition during the period of the examination and the defendant's probable mental condition at the time of the commission of the alleged offense.

(c) The report shall be certified by the Director of the Arkansas State Hospital or a designee under his or her seal or by an affidavit duly subscribed and sworn to by him or her before a notary public who shall affix the notary public's certificate and seal to it.

History. Acts 1971, No. 433, ch. 6, § 7; 1973, No. 95, § 1; 1983, No. 191, § 1; A.S.A. 1947, § 43-1301; Acts 2001, No. 1551, § 4.

Amendments. The 2001 amendment rewrote this section.

CASE NOTES

ANALYSIS

Length of commitment.
Report.

Length of Commitment.

Words "not exceeding" held to be words of limitation beyond which the court could not go in one instance, and the hospital authorities in other. *Brockelhurst v. State*, 195 Ark. 67, 111 S.W.2d 527 (1938) (decision under prior law).

Hospital had no power or legal right to demand custody for an indefinite time, to be determined by it, of a prisoner examined under former statute and determined by the hospital to be insane, and the court could not, prior to the conclusion of the criminal trial, be forced to deliver the prisoner to the hospital. *Davis v. Britt*, 243 Ark. 556, 420 S.W.2d 863 (1967) (decision under prior law).

Report.

Joint report of superintendent and physician, to which notarial seal was affixed by court's permission on day of trial, was in substantial compliance with former sec-

tion. *Brockelhurst v. State*, 195 Ark. 67, 111 S.W.2d 527 (1937) (decision under prior law).

Where report by officials of state hospital on question of accused's sanity, though not sworn to nor certified as required by law, was offered in evidence by accused, he could not complain that it made no finding as to his probable mental condition at the time homicide was committed. *Jones v. State*, 204 Ark. 61, 161 S.W.2d 173 (1942) (decision under prior law).

Doctor's testimony and reports held to be competent evidence. *Poole v. State*, 212 Ark. 746, 207 S.W.2d 725 (1948) (decision under prior law).

Where doctor from state hospital, who examined defendant, signed the report and testified at the trial regarding the report, it was not mandatory for state to produce superintendent, who certified to the report, as a witness, in order to introduce the report in evidence. *Gerlach v. State*, 217 Ark. 102, 229 S.W.2d 37 (1950) (decision under prior law).

Cited: *Dunn v. State*, 291 Ark. 131, 722 S.W.2d 595 (1987).

16-86-105. Examination and observation — Costs.

(a)(1) The cost of examination other than by examiners retained by the defendant shall be borne by the state.

(2) Room and board costs shall also be borne by the state so long as the Arkansas State Hospital has actual physical custody of the defendant for the evaluation, observation, or treatment of the defendant.

(b)(1) However, whenever an evaluation of the defendant has been completed, the county from which the defendant is sent for evaluation, within two (2) working days, shall procure the defendant from the Arkansas State Hospital.

(2) Should the county fail to procure the defendant within this two-day period, the county shall bear all room and board costs on the third and subsequent days.

History. Acts 1971, No. 433, ch. 6, § 7; 1973, No. 95, § 1; 1983, No. 191, § 1; A.S.A. 1947, § 43-1301; Acts 2001, No. 1551, § 5.

Amendments. The 2001 amendment rewrote this section.

CASE NOTES

ANALYSIS

Constitutionality.

Liability for treatment.

Constitutionality.

Former similar section held constitutional as lawful delegation of authority to determine cost of keeping persons sent to State Hospital for mental examination. *Campbell v. Arkansas State Hosp.*, 228 Ark. 205, 306 S.W.2d 313 (1957) (decision under prior law).

Former similar section was not unconstitutional as depriving county judge of exclusive jurisdiction in all matters relating to disbursement of money for county purposes, since the disbursement was an expense of enforcing state's criminal laws and not in the nature of a contribution toward state institution. *Campbell v. Arkansas State Hosp.*, 228 Ark. 205, 306 S.W.2d 313 (1957) (decision under prior law).

Liability for Treatment.

Husband was not liable for maintenance and treatment of wife at state hos-

pital where wife, who was charged with first degree murder, had been committed to the hospital without husband having been permitted to have her treated in a private institution. *Arkansas State Hosp. for Arkansas State Hosp. v. Kestle*, 236 Ark. 5, 364 S.W.2d 804 (1963) (decision under prior law).

Defendant was not entitled to public funds for investigative, psychiatric, and other services when he did not plead insanity as a defense to the charge of first-degree murder. *Blanton v. State*, 249 Ark. 181, 458 S.W.2d 373 (1970), cert. denied, 401 U.S. 1003, 91 S. Ct. 1240, 28 L. Ed. 2d 539 (1971).

The legislature, by enacting § 5-2-305, sought to minimize costs to the county as a factor influencing the decision by a trial judge to commit a criminal defendant for a mental examination; it did not eliminate payments by the county of all cost factors. *Mears v. Arkansas State Hosp.*, 265 Ark. 844, 581 S.W.2d 339 (1979).

Cited: *Dunn v. State*, 291 Ark. 131, 722 S.W.2d 595 (1987).

16-86-106. Testimony of mental health examiners.

(a)(1)(A) When a defendant has been examined, the qualified psychiatrist or qualified psychologist who prepared the examination report shall be summoned as a witness at the trial at the order of the trial judge or at the request of either party.

(B) If summoned, the psychiatrist or psychologist shall be examined by the court and may be examined by either party. A copy of the written report may be made part of the record at trial in every case in which the fact of sanity is an issue at the trial.

(2) A witness employed by the state shall be so summoned to appear as to require as little loss of time as possible from his or her other duties.

(b)(1) The actual necessary expenses of a witness incurred in attending the trial shall be borne by the state. The claims of the witness for the expenses shall be examined and approved by the trial judge before they may be allowed by the state.

(2) A witness employed by the Arkansas State Hospital shall receive no fees for his or her service as a witness.

(3)(A) If a witness is employed by a clinic or center on a part-time basis and is summoned to appear in court on a day he or she would normally be on duty, the clinic or center shall be reimbursed by the state at the same rate it pays for the employee's services.

(B) If the witness is summoned to appear on a day he or she is not on duty at the clinic or center, he or she shall be paid at the same rate he or she is paid by the clinic or center.

History. Acts 1971, No. 433, ch. 6, § 8; 1983, No. 191, § 2; A.S.A. 1947, § 43-1302; Acts 2001, No. 1551, § 6.

A.C.R.C. Notes. The reference to "defendant" in subdivision (a)(1)(B) was restored to "psychiatrist or psychologist" to correct a codification error.

Amendments. The 2001 amendment rewrote (a); substituted "may be made

part of the record at trial" for "hereby required shall be given in evidence" in (b); substituted "the state" for "either the state hospital or the centers or clinics" in (c); redesignated former (d)-(d)(2) as present (d)(1)-(d)(3); and substituted "State Hospital" for "state hospital" in present (d)(2).

Cross References. Expert witnesses, § 5-2-308.

CASE NOTES

ANALYSIS

Confrontation of witnesses.
Examiner's report.
Rebuttal.

Confrontation of Witnesses.

The records of the hospital not certified as required could not be used to prove that the defendant was sane since he was entitled to be confronted by and to cross-examine the witness against him. *Smith v. State*, 200 Ark. 1152, 143 S.W.2d 190 (1940) (decision under prior law).

When objection to the use of the report was made, process must have been issued for the physician who made it in order to comply with constitutional provision that defendant be confronted with witnesses against him. *Jones v. State*, 204 Ark. 61, 161 S.W.2d 173 (1942) (decision under prior law).

Permitting a physician from the state hospital to testify regarding the composition of the hospital staff and the procedural methods of the staff when such testimony was within the personal knowledge of the witness did not violate defendant's right to be confronted with witnesses against him as this character of testimony was not "against" the defendant. *Downs v. State*, 231 Ark. 466, 330 S.W.2d 281 (1959) (decision under prior law).

Permitting a physician from the state hospital to testify with reference to a report compiled by him and other members of the hospital staff did not violate defendant's right to be confronted with witnesses against him. *Downs v. State*, 231 Ark. 466, 330 S.W.2d 281 (1959) (decision under prior law).

Examiner's Report.

Written findings of doctor as to sanity of defendant were admissible, even though they added nothing to his testimony. *Veatch v. State*, 221 Ark. 44, 251 S.W.2d 1015 (1952) (decision under prior law).

The report of the examiners did not go to the merits of the case and never got before the jury, therefore, the doctors were not subject to cross-examination, but if the defendant was committed to the state hospital its doctors would be required to report and appear as witnesses as to the defendant's guilt. *Turner v. State*, 224 Ark. 505, 275 S.W.2d 24 (1955) (decision under prior law).

In murder trial, court did not err in permitting physician from state hospital to testify regarding hospital staff report which was compiled from findings of fourteen physicians at state hospital over objections that it was hearsay evidence and denied defendant opportunity to question the persons whose findings were included in the report. *Nail v. State*, 231 Ark. 70, 328 S.W.2d 836 (1959) (decision under prior law).

Rebuttal.

Where defendant was sent to state hospital for examination as to sanity prior to trial, it was not error on trial to permit testimony of physicians who examined him as to his sanity, in rebuttal to testimony given by witnesses for defendant that he was highly nervous. *Clements v. State*, 213 Ark. 460, 210 S.W.2d 912 (1948) (decision under prior law).

Cited: *Ellingburg v. Lockhart*, 397 F. Supp. 771 (E.D. Ark. 1975).

16-86-107. Request for examination upon defense of insanity for felony charge.

(a)(1) Whenever a defendant has been held for trial and the defense of insanity is an issue in the matter, the defendant or some person for him or her shall file a motion or request for an order of examination in the office of the clerk of the circuit court.

(2) The clerk shall immediately give notice in writing of the filing of the motion or request to the prosecuting attorney or his or her deputy.

(3) The motion or request shall be immediately presented to the circuit judge.

(b) If the court has reason to believe that the defendant should be examined and observed by reason of the suggestion of the prosecuting attorney or other court official or those interested in the defendant, it may enter the order on its own motion.

History. Acts 1971, No. 433, ch. 6, § 1; A.S.A. 1947, § 43-1304; Acts 2001, No. 1551, § 7.

Amendments. The 2001 amendment redesignated former (a) as present (a)(1)-(3); in (a)(1), deleted “by a magistrate, informed against, or indicted on a felony

charge” following “trial” and substituted “is an issue in the matter” for “is made an issue in his behalf”; deleted “who is authorized to act upon the request during vacation of the court or during any session in another county” following “judge” in present (a)(3); and deleted former (c).

CASE NOTES

ANALYSIS

Authority of court.
Denial of examination.
Failure to request.

Authority of Court.

While in certain instances the trial court could commit a defendant to the state hospital for mental examination, it had no authority to appoint commission to make such an examination. *Green v. State*, 222 Ark. 308, 259 S.W.2d 142 (1953) (decision under prior law).

Denial of Examination.

Where the record showed that two competent local physicians could not find enough indicia of insanity to warrant recommending that trial court transfer the appellant to a state hospital for examination, it was not error for the trial court to refuse to make available funds to employ a medical expert of the appellant's own choosing. *Barber v. State*, 248 Ark. 64, 450 S.W.2d 291 (1970) (decision under prior law).

Defendant's conviction was required to be set aside where the state trial court arbitrarily denied defendant's attempts to avail himself of the established state procedures whereby a mental examination at the state hospital could be obtained. *Ellingburg v. Lockhart*, 397 F. Supp. 771 (E.D. Ark. 1975).

Failure to Request.

There was no error or abuse of discretion by the trial court in not ordering a defendant pleading insanity committed to the state hospital where the defendant neither filed a motion for commitment or requested the court to appoint two physicians to examine him and determine if there was probable cause to believe him insane. *Townsend v. City of Helena*, 244 Ark. 228, 424 S.W.2d 856 (1968), cert. denied, 393 U.S. 917, 89 S. Ct. 244, 21 L. Ed. 2d 203 (1968) (decision under prior law).

Cited: *Wade v. Tomlinson*, 284 Ark. 432, 682 S.W.2d 751 (1985).

16-86-108. Plea of insanity when period before trial short or insanity alleged after charge.

(a) Whenever a defendant shall be held for trial in circuit court and the defendant alleges that he or she has become insane after being legally charged, the defendant or some person for the defendant must notify the prosecutor and the court at the earliest practicable time.

(b)(1) Failure to notify the prosecutor within a reasonable time before the trial date shall entitle the prosecutor to a continuance which for limitation purposes shall be deemed an excluded period granted on application of the defendant.

(2) Alternatively, in lieu of suspending all further proceedings in the case, the court may order the immediate examination of the defendant by a qualified psychiatrist or a qualified psychologist.

History. Acts 1971, No. 433, ch. 6, § 2; A.S.A. 1947, § 43-1305; Acts 2001, No. 1551, § 8.

Amendments. The 2001 amendment rewrote this section.

CASE NOTES

ANALYSIS

Appeal or writ of error.
Authority of court.
Denial of motion.
Testimony of examiners.

Appeal or Writ of Error.

If trial court failed to order an inquiry upon suggestion of insanity at time of trial the error could be corrected by appeal or writ of error, but not by writ of error coram nobis. *Jenkins v. State*, 223 Ark. 245, 265 S.W.2d 512, cert. denied, 347 U.S. 956, 74 S. Ct. 683, 98 L. Ed. 1101 (1954) (decision under prior law).

Authority of Court.

While in certain instances the trial court could commit a defendant to the state hospital for mental examination, it had no authority to appoint commission to make such an examination. *Green v. State*, 222 Ark. 308, 259 S.W.2d 142 (1953) (decision under prior law).

Denial of Motion.

Denial of a defendant's motion requesting commitment to the state hospital for

examination did not deny him the right to assert and try to prove the defense of insanity. *Turner v. State*, 224 Ark. 505, 275 S.W.2d 24 (1955) (decision under prior law).

Where defendant filed a motion requesting commitment to the state hospital and the court appointed two examiners who found no insanity, court had no reason as a matter of law to believe the defendant was insane and could deny the motion. *Turner v. State*, 224 Ark. 505, 275 S.W.2d 24 (1955) (decision under prior law).

Testimony of Examiners.

Report of the examiners did not go to the merits of the case and never got before the jury, therefore, the doctors were not subject to cross-examination, but if the defendant was committed to the state hospital its doctors would be required to report and appear as witnesses as to the defendant's guilt. *Turner v. State*, 224 Ark. 505, 275 S.W.2d 24 (1955) (decision under prior law).

Cited: *Ellingburg v. Lockhart*, 397 F. Supp. 771 (E.D. Ark. 1975).

16-86-109. [Repealed.]

Publisher's Notes. This section, concerning the order for the observation and examination of the defendant in a criminal case, was repealed by Acts 2001, No.

1551, § 9. The section was derived from Acts 1971, No. 433, ch. 6, § 3; A.S.A. 1947, § 43-1306.

16-86-110. Insufficient time to submit report to court.

When proper and timely request is made to the court for an order of examination and observation and there is not sufficient time to complete the examination and submit the report before scheduled proceedings in the case, the court may order examination and immediately continue the case until the examination is complete and the report of that examination is submitted to the court.

History. Acts 1971, No. 433, ch. 6, § 4; A.S.A. 1947, § 43-1307; Acts 2001, No. 1551, § 10.

Amendments. The 2001 amendment rewrote this section.

CASE NOTES

Cited: Ellingburg v. Lockhart, 397 F. Supp. 771 (E.D. Ark. 1975).

16-86-111. Allegation of insanity of convicted defendant.

(a) The procedure provided in this chapter shall also be followed, insofar as it is applicable, in any case in which the insanity of the convicted defendant is alleged as a ground for postponing or not carrying out execution of any sentence imposed as part of the judgment of conviction of the defendant.

(b) In such cases, a hearing shall be held in the manner provided by law, but the evidence provided for in this subchapter shall be given at the hearing.

History. Acts 1971, No. 433, ch. 6, § 9; A.S.A. 1947, § 43-1303; Acts 2001, No. 1551, § 11.

Amendments. The 2001 amendment substituted "provided in this subchapter"

for "prescribed in §§ 16-86-102 — 16-86-106" in (a); and substituted "this subchapter" for "§§ 16-86-101 — 16-86-110 and 16-86-113" in (b).

CASE NOTES**ANALYSIS**

Discretion of court.
Prior examination.

Discretion of Court.

When insanity is claimed as a ground for postponement of sentence, the trial court is empowered to exercise its discretion. O'Rourke v. State, 295 Ark. 57, 746 S.W.2d 52 (1988).

Prior Examination.

It was not error to refuse to delay sen-

tencing of the defendant because of defendant's alleged mental condition where, prior to trial, defendant had been examined at the state hospital and found to be without psychosis. Murphy v. State, 248 Ark. 794, 454 S.W.2d 302 (1970) (decision under prior law). O'Rourke v. State, 295 Ark. 57, 746 S.W.2d 52 (1988).

Cited: Ellingburg v. Lockhart, 397 F. Supp. 771 (E.D. Ark. 1975).

16-86-112. Escape of committed person.

(a) A person committed to the state hospital in compliance with this chapter who escapes from the hospital shall be returned to the jurisdiction of the committing court upon his or her apprehension.

(b) After the return of the person to the jurisdiction of the committing court, the court may recommit him or her to the Arkansas State Hospital for further examination or make such other orders as, in its discretion, may be deemed necessary to provide for the custody of the person.

History. Acts 1971, No. 433, ch. 6, §§ 10, 11; A.S.A. 1947, §§ 43-1310, 43-1311.

16-86-113. Authority of court in vacation.

The circuit judges in vacation may make any order pertaining to the commitment, examination, observation, or return from the Arkansas State Hospital, after examination, of any defendant that they might make during a regular term of court at which the defendant might be tried.

History. Acts 1971, No. 433, ch. 6, § 6; A.S.A. 1947, § 43-1309.

CASE NOTES

Cited: *Ellingburg v. Lockhart*, 397 F. Supp. 771 (E.D. Ark. 1975).

CHAPTER 87**PUBLIC DEFENDERS****SUBCHAPTER**

1. GENERAL PROVISIONS.
2. ARKANSAS PUBLIC DEFENDER COMMISSION.
3. FUNDING.

A.C.R.C. Notes. Uncodified Acts 1989, No. 442, §§ 2 and 3, were amended by Acts 1993, No. 281. Acts 1993, No. 281, was repealed by Acts 1993, No. 1193, § 20. Acts 1989, No. 442 was repealed by Acts 1995, No. 1256, § 21, as amended by Acts 1995 (1st Ex. Sess.), No. 13, § 5.

References to "this chapter" in § 16-87-101 may not apply to subchapters 2 or 3 which were enacted subsequently.

Publisher's Notes. As to establishment of public defender systems in certain

circuits, see Acts 1975, No. 242; Acts 1975, No. 279; Acts 1981, No. 318; Acts 1983, No. 576 [repealed]; Acts 1983, No. 607 [repealed]; Acts 1983, No. 682 [repealed]; Acts 1983, No. 919 [repealed]; Acts 1985 (1st Ex. Sess.), No. 8; Acts 1985 (1st Ex. Sess.), No. 21.

Cross References. Appointment of counsel, ARCrP 8.2.

Fund to pay defense costs for indigents, § 14-20-102.

Effective Dates. Acts 1989, No. 692,

§ 3: Mar. 20, 1989. Emergency clause provided: "It is hereby found and determined that there is an immediate need for public defenders to employ an investigator and that this act assists the counties in providing for an investigator. This act being necessary for the public peace, health, and welfare, an emergency is declared to exist and this act shall be in full force and effect from and after its passage and approval."

Acts 1975, No. 996, § 12: Apr. 11, 1975. Emergency clause provided: "The General Assembly hereby finds and determines; that it is essential to the administration of justice in conformity with the constitutional guarantee and right to effective assistance of counsel that persons who are financially unable to employ counsel be provided same at public expense; that the present system of the court assigning attorneys to represent indigent defendants for little or no compensation has become a severe burden on the lawyers of each judicial district in the State of Arkansas; that many lawyers have not developed or maintained adequate expertise in the highly specialized field of criminal law to effectively represent indigent defendants pursuant to the present assigned counsel system; and that this Act is immediately necessary to provide a system for making effective assistance of counsel available to indigent defendants in each judicial district in order to assure the proper administration of justice, and to relieve attorneys of the undue burden and indigent defendants of the potential handicap, which each must bear under the present assigned counsel system. Therefore, an emergency is hereby declared to exist; and this Act being necessary for the preservation of the public peace, health and safety shall be in effect from the date of its passage and approval."

Acts 1991, No. 896, § 5: Mar. 29, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present law pertaining to the defense of indigent persons by public defenders is in need of strengthening; this Act makes the necessary changes in the public defender law; and that this Act

should go into effect as soon as possible in order to protect the constitutional rights of indigent defendants. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1991, No. 898, § 5: Mar. 29, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is an immediate necessity for funding coordination for the public defender office between counties of multi-county judicial districts and that this Act so provides. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1991, No. 904, § 28: Mar. 29, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that the language of certain court cost statutes lacks uniformity; that such lack of uniformity is detrimental to the proper collection of such court costs; and that such language should be standardized to promote the proper collection of such costs. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1991, No. 914, § 6: Mar. 29, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that public defenders should be appointed for two (2) year terms; that this Act so provides; and that this Act should go into effect immediately in order to provide for the appointments for two (2) year terms as soon as possible. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Maximum fees for attorney appointed to represent indigent, 3 ALR 4th 576.

Power of court to change counsel appointed for indigent, against objections of accused and original counsel. 3 ALR 4th 1227.

Public defender's immunity from liability for malpractice, 6 ALR 4th 774.

Continuances at instance of public defender or appointed counsel over defendant's objections as excuse for denial of speedy trial. 16 ALR 4th 1283.

State recoupment statutes permitting state to recover counsel fees expended for benefit of indigent criminal defendants. 39 ALR 4th 597.

Ark. L. Rev. Case Notes. Ferri v. Ackerman: Malpractice Liability of Appointed Counsel, 34 Ark. L. Rev. 746.

UALR L.J. Note, Constitutional Law — Indigent Defense — Arkansas Statutory Fee and Expense Limitations Unconstitutional. Arnold v. Kemp, 306 Ark. 294, 813 S.W.2d 770 (1991), 14 UALR L.J. 595.

CASE NOTES

Exclusion of Sixth District.

In all jurisdictions other than the Sixth Judicial District, the procedure for the selection and compensation of public de-

fenders is governed by this chapter. Thorne v. State, 269 Ark. 556, 601 S.W.2d 886 (1980).

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

16-87-101. Title.

16-87-102 — 16-87-113. [Repealed.]

Effective Dates. Acts 1995 (1st Ex. Sess.), No. 13, § 13: Oct. 23, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that the current system of funding the state judicial system has created inequity in the level of judicial services available to the citizens of the state; and it is further determined that the current method of financing the state judicial system has become so complex as to make the administration of the system impossible, and the lack of reliable data on the current costs of the state judicial system prohibits any comprehensive change in the funding of the system at this time. Therefore, an emergency is declared to exist and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1999, No. 1564, § 10: Apr. 15,

1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that there is an immediate necessity for additional funding to provide for the defense of indigent persons by public defenders that this Act so provides; and that this Act should go into effect as soon as possible in order to protect the constitutional rights of indigent defendants. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

16-87-101. Title.

This chapter may be cited as the "Public Defender Act".

History. Acts 1975, No. 996, § 1; A.S.A. 1947, § 43-3301.

16-87-102 — 16-87-113. [Repealed.]

Publisher's Notes. Former §§ 16-87-102 — 16-87-113, concerning public defenders, were repealed by Acts 1999, No. 1564, § 1. The sections were derived from the following sources:

16-87-102. Acts 1975, No. 996, § 2; A.S.A. 1947, § 43-3302.

16-87-103. Acts 1975, No. 996, § 3; A.S.A. 1947, § 43-3303.

16-87-104. Acts 1975, No. 996, §§ 4, 5; A.S.A. 1947, §§ 43-3304, 43-3305; Acts 1991, No. 914, § 2.

16-87-105. Acts 1975, No. 996, §§ 6, 7; A.S.A. 1947, §§ 43-3306, 43-3307; Acts 1991, No. 914, § 1.

16-87-106. Acts 1975, No. 996, §§ 6, 7;

A.S.A. 1947, §§ 43-3306, 43-3307; Acts 1991, No. 896, § 1.

16-87-107. Acts 1975, No. 996, § 6; A.S.A. 1947, § 43-3306; Acts 1991, No. 898, § 1.

16-87-108. Acts 1975, No. 996, §§ 8, 9; A.S.A. 1947, §§ 43-3308, 43-3309.

16-87-109. Acts 1975, No. 996, § 10; A.S.A. 1947, § 43-3310.

16-87-110. Acts 1975, No. 996, § 10; A.S.A. 1947, § 43-3310.

16-87-111. Acts 1989, No. 692, § 1; 1991, No. 904, §§ 10, 20; 1991, No. 992, § 1; 1995, No. 1256, § 20; 1995 (1st Ex. Sess.), No. 13, § 4.

16-87-112. Acts 1991, No. 925, § 1.

16-87-113. Acts 1995, No. 1289, § 1.

SUBCHAPTER 2 — ARKANSAS PUBLIC DEFENDER COMMISSION**SECTION.**

16-87-201. Definitions.

16-87-202. Arkansas Public Defender Commission — Fund created.

16-87-203. Powers and duties.

16-87-204. Executive director.

16-87-205. Capital, Conflicts, and Appellate Office.

SECTION.

16-87-206 — 16-87-210. [Repealed.]

16-87-211. Compensation.

16-87-212. Court fees and expenses.

16-87-213. Certificate of indigency.

16-87-214. Prohibited conduct.

16-87-215. Trial Public Defender Office.

16-87-216. Juvenile Ombudsman Division.

A.C.R.C. Notes. References to "this chapter" in § 16-87-101 may not apply to this subchapter which was enacted subsequently.

Effective Dates. Acts 1993, No. 1193, § 21; July 1, 1993. Emergency clause provided: "It is hereby found and determined by the Seventy-Ninth General Assembly that the decision of the Arkansas Supreme Court in *State v. Post et al*, Case No. 92-787, has created great uncertainty regarding the payment of the legal fees and expenses in connection with the legal representation of indigent persons charged with crimes punishable by imprisonment and that delay in the effective date of this act beyond July 1, 1993, would cause

irreparable harm to the proper implementation of a statewide public defender program. Therefore, and emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1993."

Acts 1997, No. 141, § 5; Feb. 13, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that in many rural areas there are not enough attorneys to serve as public defenders; that this lack of personnel needed to preserve our rights as guaranteed under the United States Constitution constitutes a great

burden on the State's judicial system, which should be immediately corrected; and that this bill eliminates some of the restrictions on serving as public defender. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1997, No. 250, § 258: Feb. 24, 1997. Emergency clause provided: "It is hereby found and determined by the General Assembly that Act 1211 of 1995 established the procedure for all state boards and commissions to follow regarding reimbursement of expenses and stipends for board members; that this act amends various sections of the Arkansas Code which are in conflict with the Act 1211 of 1995; and that until this cleanup act becomes effective conflicting laws will exist. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor [sic], it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1997, No. 788, § 36 and No. 1341,

§ 35: became law without the Governor's signature. Noted Mar. 11, 1997 and April 11, 1997, respectively. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the effectiveness of this act on July 1, 1997 is essential to the operation of the state court system, and that in the event of an extension of the Regular Session, the delay in the effective date of this act beyond July 1, 1997 could work irreparable harm upon the proper administration and provision of essential governmental progress. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety, shall be in full force and effect from and after July 1, 1997."

Acts 1999, No. 1564, § 10: Apr. 15, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that there is an immediate necessity for additional funding to provide for the defense of indigent persons by public defenders that this Act so provides; and that this Act should go into effect as soon as possible in order to protect the constitutional rights of indigent defendants. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Attorneys, 16 UALR L.J. 61.

CASE NOTES

Applicability.

Where appointments of private attorneys were made before July 1, 1993, this

subchapter did not apply. *State v. Crittenden County*, 320 Ark. 356, 896 S.W.2d 881 (1995).

16-87-201. Definitions.

For the purpose of this subchapter:

(1) "Commission" means the Arkansas Public Defender Commission created by this subchapter;

(2) "Executive director" means the person appointed by the commission pursuant to this subchapter; and

(3) "Indigent person" means a person who, at the time his or her need is determined, is without sufficient funds or assets to employ an attorney or afford other necessary expenses incidental thereto.

History. Acts 1993, No. 1193, § 17.

16-87-202. Arkansas Public Defender Commission — Fund created.

(a) There is hereby created the Arkansas Public Defender Commission.

(b)(1) The commission shall be composed of seven (7) members appointed by the Governor for five-year terms.

(2) At least four (4) members of the commission shall be attorneys who are licensed to practice law in the State of Arkansas and experienced in the defense of persons accused of crimes.

(3) At least one (1) member of the commission shall be a county judge, and at least one (1) member shall be a trial judge who hears criminal cases.

(4) No more than two (2) members of the commission shall be residents of the same congressional district, and no two (2) members of the commission shall be residents of the same county.

(5) A commission member shall be eligible for reappointment and shall continue in office until a successor is appointed and qualified.

(6) The Governor shall designate one (1) commission member to serve as chair.

(c)(1) The commission shall meet at least once each quarter upon the call of the chair.

(2) Commission members shall serve without compensation but may receive expense reimbursement in accordance with § 25-16-901 et seq.

History. Acts 1993, No. 1193, § 11; 1997, No. 250, § 117.

Publisher's Notes. Subsection (a), as originally enacted by Acts 1993, No. 1193, § 11, also provided that one (1) of the initial appointees shall serve a term of one

(1) year, one (1) shall serve a term of two (2) years, one (1) shall serve a term of three (3) years, two (2) shall serve a term of four (4) years, and two (2) shall serve a full five (5) year term.

16-87-203. Powers and duties.

(a) The Arkansas Public Defender Commission shall have the following powers and duties:

(1) To establish policies and standards for the public defender system throughout the state, including standards for determining who qualifies as an indigent person;

(2) To establish policies and standards for the organization and operation of public defenders' offices throughout the state, including funding, compensation, staffing, and standards of experience for attorneys assigned to particular cases;

(3) To allocate personnel for each public defender's office throughout the state;

(4) To require annual reports regarding expenditures, caseloads, and status of cases from each public defender;

(5) To evaluate the performance of the Executive Director of the Arkansas Public Defender Commission, the Capital, Conflicts, and Appellate Office, the Trial Public Defender Office, each public defender, and private attorneys assigned to represent indigent persons;

(6) To approve the reassignment of cases from one public defender to another public defender in an adjacent area for the purpose of avoiding conflicts or adjusting caseloads;

(7) To approve the purchase, rental, and sharing of office space, equipment, or personnel among public defenders in the event and to the extent such items have been provided through an appropriation of the General Assembly;

(8) To establish employee personnel policies for the commission and the public defenders;

(9) To accept and to authorize a public defender to accept moneys, gifts, grants, or services from any public or private source;

(10) To enter and authorize a public defender to enter into contracts with individuals, educational institutions, nonprofit associations, or state or federal agencies, including contracts for the provision of legal services related to the defense of indigent persons;

(11) To maintain for each judicial district a current list of private attorneys who are willing to accept court appointments and who meet any other qualifications established by the commission;

(12) To maintain a separate list of private attorneys who are willing to accept court appointments in capital cases and who meet any other qualifications established by the commission;

(13) To oversee the Juvenile Ombudsman Division of the Arkansas Public Defender Commission; and

(14) To perform all other functions and duties as authorized by law.

(b) The commission shall operate the trial public defender system in such a manner that the respective trial public defenders shall not be deemed to be part of the same office for purposes of appointment in conflict of interest situations and in such a manner that the Capital, Conflicts, and Appellate Office shall not be deemed a part of the same office as any trial public defender for purposes of appointment in conflict of interest situations.

(c) The commission shall make an annual report to the Governor, the President Pro Tempore of the Senate, the Speaker of the House of

Representatives, the Chief Justice of the Arkansas Supreme Court, and the Chief Judge of the Arkansas Court of Appeals regarding the efforts of the commission to implement this subchapter.

(d) There is hereby created on the books of the Treasurer of State, Auditor of State, and Chief Fiscal Officer of the State a fund to be known as the "Public Defender Fund" to be used exclusively by the commission, as appropriated by the General Assembly.

History. Acts 1993, No. 1193, § 11; 1997, No. 788, § 18; No. 1341, § 18; 1999, No. 1580, § 8; 2001, No. 1799, § 1.

Amendments. The 2001 amendment added (a)(14).

Cross References. Legislative intent of Acts 1997, Nos. 788 and 1341, § 16-10-601.

Transition to state funding, § 16-87-301.

CASE NOTES

Cited: Hillard v. State, 321 Ark. 39, 900 S.W.2d 167 (1995).

16-87-204. Executive director.

(a)(1) The commission shall appoint an executive director who shall be licensed to practice law in the State of Arkansas, licensed to practice law for at least four (4) years prior to the effective date of the appointment, and experienced in the practice of criminal law, including the defense of capital cases.

(2) The commission may remove the executive director only for just cause, which includes permanent physical or mental disability which seriously interferes with the performance of duties, willful misconduct in office, willful and persistent failure to perform the duties of public defender, habitual intemperance, or conduct prejudicial to the administration of justice.

(b) The executive director shall have the following powers and duties:

(1) To supervise the operations of the Capital, Conflicts, and Appellate Office, and the Trial Public Defender Office;

(2) To maintain records of the operation of the public defender system, including, but not limited to, the following:

(A) Detailed descriptions of the organization of each public defender's office;

(B) The caseload of each public defender's office, including cases assigned to private attorneys;

(C) Budgets and actual expenditures of the commission and each public defender's office;

(D) Reassignment of cases from one (1) public defender to another public defender in an adjacent area; and

(E) Assignment of cases to private attorneys;

(3) To present to the commission within ninety (90) days after the end of the fiscal year an annual report on the operation of the public defender system which shall include:

- (A) An accounting of all funds received and disbursed;
- (B) An evaluation of the cost-effectiveness of the public defender system; and
- (C) Recommendations for improvement;
- (4) To prepare a budget for the operations of the commission;
- (5) To allocate and disburse funds appropriated for the operations of the commission and the public defender system pursuant to guidelines established by the commission;
- (6) To allocate public defender, investigator, and secretary positions to the office of the public defender in each county or judicial district, based upon a formula established by the commission;
- (7) To establish procedures for evaluating the performance of public defenders and private attorneys participating in the public defender system, pursuant to policies and standards developed by the commission;
- (8) To appear before and provide assistance to the General Assembly and other relevant bodies regarding matters related to the public defender system;
- (9) To convene conferences and training seminars related to the public defender system;
- (10) To compile and disseminate statutes, court opinions, and other information to public defenders and private attorneys participating in the public defender system;
- (11) To maintain a brief bank for use in connection with appeals;
- (12) To perform other duties related to the administration of the public defender system as the commission may direct; and
- (13)(A) To supervise the operation of the Juvenile Ombudsman Division of the Arkansas Public Defender Commission; and
- (B) To maintain records of such operation, including, but not limited to:
 - (i) The preparation of a budget and record of actual expenditures;
 - (ii) The assignment of cases and caseload of each ombudsman;
 - (iii) An evaluation of the performance of each ombudsman; and
 - (iv) A detailed description of the organization of each office of the division.

History. Acts 1993, No. 1193, § 12; of Acts 1997, Nos. 788 and 1341, § 16-10-1997, No. 788, § 19; No. 1341, § 19; 1999, 601.
No. 1580, § 9. Transition to state funding, § 16-87-

Cross References. Legislative intent 301.

16-87-205. Capital, Conflicts, and Appellate Office.

(a) There is hereby created the Capital, Conflicts, and Appellate Office to represent indigent defendants when the death penalty is sought and the trial public defender's office is unable to represent the defendant for the reasons set forth in subdivision (c)(1)(A) of this section.

(b) The Capital, Conflicts, and Appellate Office shall operate under the supervision of the Executive Director of the Arkansas Public Defender Commission.

(c)(1) The Arkansas Public Defender Commission shall be appointed by the trial court in the following situation:

(A)(i) In capital murder cases in which the death penalty is sought if a conflict of interest is determined by the court to exist between the trial public defender's office and the indigent person or if for any other reason the court determines that the trial public defender cannot or should not represent the indigent person.

(ii) The representation may be in conjunction with appointed private attorneys.

(iii) In capital murder cases, unless the prosecuting attorney informs the circuit court at the arraignment of the defendant that the death penalty will not be sought, it shall be presumed for purposes of this section that the death penalty will be sought.

(iv)(a) The executive director may assign the Capital, Conflicts, and Appellate Office, a trial public defender from another area, a private attorney whose name appears on a list of attorneys maintained by the commission, or a combination of private and public defender attorneys to represent the indigent person.

(b) The executive director shall notify the trial court of the assignment and an order reflecting the assignment shall be entered.

(2)(A) In noncapital cases, if a conflict of interest is determined by the court to exist between the trial public defender's office and the indigent person, or if for any other reason the court determines that the trial public defender cannot or should not represent the indigent person, then the court, if time permits shall contact the commission to determine if a public defender from an adjacent area is available for appointment.

(B)(i) If time does not permit or if there is not a trial public defender from an adjacent area available, then the court may appoint a private attorney.

(ii) The trial judge shall notify in writing the commission of the appointment, the type of case, and the reason for the appointment within twenty (20) days of the appointment.

(d) To the extent money is appropriated, the executive director of the commission may hire attorneys, investigators, research assistants, and other staff as necessary to properly represent indigent persons.

History. Acts 1993, No. 1193, § 7; 2001, No. 1799, § 2; 2003, No. 606, § 1.

Amendments. The 2001 amendment rewrote this section.

The 2003 amendment added the lan-

guage beginning "to represent indigent defendants" in (a); inserted "trial" preceding "public" in (c)(2)(B)(i); and made stylistic changes.

CASE NOTES

Purpose.

The clear intent in the General Assembly's creation of the Capital, Conflicts, and Appellate Office was to allocate to the state, if at all possible, the burdensome costs of defending capital murder cases; the primary thrust of the legislation

would be thwarted by placing the duty of payment after June 30, 1993, on a county because the Capital, Conflicts, and Appellate Office was not operational at the time private attorneys were appointed. *State v. Crittenden County*, 320 Ark. 356, 896 S.W.2d 881 (1995).

16-87-206 — 16-87-210. [Repealed.]

Publisher's Notes. Former §§ 16-87-206 — 16-87-208, concerning trial public defender offices and personnel, were repealed by Acts 1999, No. 1564, § 2. Former §§ 16-87-209 and 16-87-210, concerning court appointed attorneys and attorneys' fees and expenses, were repealed by Acts 2001, No. 1799, §§ 3 and 4. The sections were derived from the following sources:

16-87-206. Acts 1993, No. 1193, §§ 1, 2, 16.

16-87-207. Acts 1993, No. 1193, § 3.

16-87-208. Acts 1993, No. 1193, §§ 4, 5; 1997, No. 141, § 1.

16-87-209. Acts 1993, No. 1193, § 6; 1999, No. 1564, § 3.

16-87-210. Acts 1993, No. 1193, § 8; 1997, No. 788, § 21; No. 1341, § 21.

16-87-211. Compensation.

(a) On an interim basis in complex cases or at the conclusion of each case, the appointed attorney shall submit his or her bill to the appointing court, which shall issue an order authorizing compensation.

(b)(1) An application for compensation shall be submitted to the Arkansas Public Defender Commission accompanied by the affidavit of the appointed attorney detailing the hours spent on the case and the services rendered and whether compensation was received or has been applied for from any other source.

(2) The commission shall determine and set the compensation award based upon guidelines established by the commission.

(c) There shall be no maximum amount of compensation in capital cases.

History. Acts 1993, No. 1193, § 9; 1999, No. 1564, § 4; 2001, No. 1343, § 1; 2001, No. 1799, § 5.

Amendments. The 2001 amendment by Nos. 1343 and 1799, in (a), substituted "On an interim basis in complex cases or

at the" for "At the" and "authorizing" for "for appropriate"; inserted "submitted to the Arkansas Public Defender Commission" in present (b)(1); added (b)(2) and made related changes; and deleted former (d) and (e).

16-87-212. Court fees and expenses.

(a)(1) The Arkansas Public Defender Commission is authorized to pay for certain expenses regarding the defense of indigents.

(2) The expenses shall include, but shall not necessarily be limited to, fees for appointed counsel, expert witnesses, temporary investigators, testing, and travel.

(3)(A) Whenever a judge orders an authorized payment in a case involving an indigent person, a copy of the order accompanied by a

detailed explanation of services rendered, time spent, and expenses incurred shall be transmitted to the commission, and the commission shall set the amount of compensation.

(B) Orders as authorized throughout this chapter shall be paid by the commission provided sufficient funds are available.

(b)(1) With the approval of the executive director, trial public defenders, appointed private attorneys, and the Capital, Conflicts, and Appellate Office are hereby authorized to utilize the services of the State Crime Laboratory for pathology and biology, toxicology, criminalistics, raw drug analysis, latent fingerprint identification, questioned documents examination, firearms and toolmarks identification, and in other such areas as the trial judge may deem necessary and appropriate.

(2) If approved by the executive director, the State Crime Laboratory shall provide the requested services.

(c) At the discretion of the commission, capital murder cases and all proceedings under the Arkansas Rules of Criminal Procedure, Rule 37.5, shall be paid entirely by the commission.

History. Acts 1993, No. 1193, § 10; 1997, No. 788, § 22; No. 1341, § 22; 2001, No. 1343, § 2; 2001, No. 1799, § 6.

Amendments. The 2001 amendment by Nos. 1343 and 1799 substituted “an authorized payment ... amount of compensation” for “the payment of funds for the aforementioned expenses, the judge shall transmit a copy of the order to the

commission, which is authorized in its discretion to pay the funds” in (a)(3)(A); and added (a)(3)(B) and (C) and made related changes.

Cross References. Legislative intent of Acts 1997, Nos. 788 and 1341, § 16-10-601.

Transition to state funding, § 16-87-301.

CASE NOTES

Applicability.

Where appointments of private attorneys were made before July 1, 1993, this

subchapter did not apply. *State v. Crittenden County*, 320 Ark. 356, 896 S.W.2d 881 (1995).

16-87-213. Certificate of indigency.

(a)(1)(A) Any person charged with an offense punishable by imprisonment who desires to be represented by an appointed attorney shall file with the court in which the person is charged a written certificate of indigency.

(B) The certificate of indigency shall be in a form approved by the Arkansas Public Defender Commission and shall be provided by the court in which the person is charged.

(C) The certificate of indigency shall be executed under oath by the person and shall state in bold print that a false statement is punishable as a Class D felony.

(D) Upon execution, the certificate of indigency shall be made a permanent part of the indigent person's records.

(2)(A)(i) If the court in which the person is charged determines that the person qualifies for the appointment of an attorney under standards set by the commission, the court, except as otherwise

provided by this subchapter, shall appoint the trial public defender to represent the person before the court.

(ii) The court shall not appoint counsel prior to review of the submitted affidavit.

(B)(i)(a) At the time of appointment of counsel, the court shall assess a fee of not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100) to be paid to the commission in order to defray the costs of the public defender system.

(b) The fee may be waived if the court finds such an assessment to be too burdensome.

(ii)(a) All the user fees shall be collected by the county or city official, agency, or department designated under § 16-13-709 as primarily responsible for the collection of fines assessed in the circuit courts and district courts of this state who shall remit to the commission by the tenth day of each month all of the fees collected on forms provided by the commission.

(b) The commission shall deposit the money collected into a separate account within the State Central Services Fund entitled "Public Defender User Fees".

(3) The appointing court may at any time review and redetermine whether a person is an indigent person who qualifies for the appointment of an attorney pursuant to this subchapter.

(b)(1) The State of Arkansas or a county, or both, may file a civil action for recovery of money expended in the representation of a person who is determined by a court not to have been indigent at the time expenditures were made.

(2) Suit shall be brought within three (3) years after the date a certificate of indigency is filed.

(c) Nothing in this section shall be construed to bar a prosecution for perjury or other offenses based on misrepresentation of financial status.

History. Acts 1993, No. 1193, § 13; 1999, No. 1564, § 5; 2001, No. 1799, § 7; 2001, No. 1809, § 6; 2003, No. 1765, § 23.

Amendments. The 2001 amendment by Nos. 1799 and 1809, in (a)(2)(B)(ii), deleted "by the quorum court" following

"entity designated" and "or, in the case of a municipal court, the municipal court clerk" at the end; inserted "100% of" in (a)(2)(B)(iii)(a); and made minor stylistic changes.

The 2003 amendment rewrote (a)(2)(B).

16-87-214. Prohibited conduct.

(a) A trial public defender or a deputy trial public defender shall not:

(1) Receive any funds, services, or other thing of monetary value, directly or indirectly, for the representation of an indigent person pursuant to court appointment, except the compensation authorized by law; or

(2) Refer any person, indigent or otherwise, who contacts the trial public defender to any other attorney, except pursuant to guidelines established by the Arkansas Public Defender Commission.

(b) Nothing in this section shall be construed to bar a prosecution or other disciplinary action against a trial public defender or deputy trial

public defender who commits a violation of the law or the Supreme Court Model Rules of Professional Conduct.

(c) The commission and the Executive Director of the Arkansas Public Defender Commission shall not interfere with the discretion, judgment, or advocacy of a trial public defender, a deputy trial public defender, or an appointed private attorney in the representation of indigent persons, but nothing in this subsection shall be construed to preclude the commission or the executive director from refusing to approve an expenditure of public funds.

History. Acts 1993, No. 1193, § 14.

CASE NOTES

ANALYSIS

Construction.

Compensation of public defender.

Construction.

When considered with the relevant public-defender statutes, it is evident that the reference to appointed counsel in Arkansas Supreme Court Rule 6-6(c) is to attorneys not otherwise compensated for their representation. *Rushing v. State*, 340 Ark. 84, 8 S.W.3d 489 (2000).

Compensation of Public Defender.

The Regular Salary Procedures and Restrictions Act found in § 19-4-1601 et seq. prohibits the public defender from receiving compensation from the State in an amount greater than that established by the General Assembly as the maximum annual salary for the state-salaried public defender. *Rushing v. State*, 340 Ark. 84, 8 S.W.3d 489 (2000).

Cited: *Emery v. State*, 341 Ark. 193, 15 S.W.3d 672 (2000).

16-87-215. Trial Public Defender Office.

There is hereby created the Trial Public Defender Office within the Arkansas Public Defender Commission, to be composed as follows:

(1) The Trial Public Defender Office shall supervise the development and operations of each of the components of the Arkansas trial public defender system pursuant to the rules, regulations, and standards for governing the system adopted by the commission;

(2)(A) The Executive Director of the Arkansas Public Defender Commission shall appoint a defense services administrator.

(B) The administrator shall be chosen solely on the basis of training, experience, and other qualifications.

(C) The administrator need not be licensed to practice law; and

(3) The administrator may hire support staff and other personnel as necessary to properly discharge the duties assigned to the office to the extent allowed and as funds are appropriated by the General Assembly.

History. Acts 1997, No. 788, § 17; 1997, No. 1341, § 17.

Transition to state funding, § 16-87-301.

Cross References. Legislative intent of Acts 1997, Nos. 788 and 1341, § 16-10-601.

16-87-216. Juvenile Ombudsman Division.

(a) For purposes of this section, the following definitions shall apply:

(1) "Best interests of the juvenile" includes those actions and courses of action which:

(A) Keep the juvenile safe from physical, mental, or sexual abuse while in state custody;

(B) Are considerate of the court's recommendations and adhere to the juvenile's treatment plan; and

(C) Work toward rehabilitating the juvenile;

(2) "Division" means the Division of Youth Services of the Department of Health and Human Services;

(3) "Executive director" means the Executive Director of the Arkansas Public Defender Commission; and

(4) "Juvenile" means any juvenile who has been committed to the custody of the Division of Youth Services pursuant to a disposition order of the juvenile division of circuit court.

(b)(1) It is the intent of the General Assembly to create a Juvenile Ombudsman Division of the Arkansas Public Defender Commission to provide for independent oversight of the Division of Youth Service's facilities and programs that are unlicensed or unaccredited.

(2) There shall be created within the commission a juvenile ombudsman and assistant juvenile ombudsmen that shall be appointed by the executive director.

(3) The minimum qualifications for an ombudsman shall be as follows:

(A) A master's degree in:

(i) Social work;

(ii) Psychology;

(iii) Law; or

(iv) A related field; or

(B) A bachelor's degree in:

(i) Social work;

(ii) Psychology; or

(iii) A related field; or

(C) Four (4) years' direct experience in programs serving juvenile offenders and their families.

(4) No waiver of the minimum qualifications in subdivision (b)(3) of this section shall be permitted.

(c) The powers and duties of the ombudsman shall be as follows:

(1) The ombudsman shall be given online access to all tracking systems maintained by the Division of Youth Services including but not limited to the:

(A) Incident report tracking system and the disposition of incidents reported therein;

(B) Parent helpline tracking system; and

(C) Juvenile tracking system;

(2) The ombudsman may attend scheduled meetings or reviews of juvenile intake, program progress, or aftercare planning;

(3) The ombudsman shall be given access to any meeting or document that would be accessible to the general public through the Freedom of Information Act of 1967, § 25-19-101 et seq.;

(4) The ombudsman shall be given reasonable prior notice of all major activities of the Audit and Compliance Section of the Division of Youth Services and shall be permitted to accompany the monitor or monitoring team of the Division of Youth Services on any monitoring visit or audit;

(5) The ombudsman shall be subject to the same compliance with all procedures, policies, and laws regarding the confidentiality of juveniles committed to the Division of Youth Services as required by division employees;

(6) The ombudsman may initiate and maintain contact with any juvenile during the juvenile's custodial placement or while on aftercare status;

(7) The ombudsman shall be given access to the juveniles and to the juveniles' records and meetings of program progress and case planning at all the privately contracted facilities of the Division of Youth Services;

(8)(A) To identify instances where necessary services are not being provided with respect to the safety, health, education, and rehabilitation of the juvenile as identified in a treatment plan.

(B) When a problem is identified, the ombudsman shall notify the Director of the Division of Youth Services of the Department of Health and Human Services or his or her designee, the juvenile court having jurisdiction, the juvenile's parents or guardian, and the juvenile's attorney or attorneys of the problem;

(9) To document a juvenile's questions, complaints, and concerns related to the juvenile's health, safety, education, and treatment and seek answers to those questions and address the complaints and concerns in an expedient manner;

(10) To request and review, as needed, all records on the history and treatment of the juvenile while in the custody of the Division of Youth Services or in aftercare, including related agency and court records;

(11) To make unannounced visits to the unlicensed or unaccredited facilities of the Division of Youth Services, whether state-run or privately operated, to assure the safety and well-being of the juveniles;

(12) Upon receipt of a complaint involving alleged child maltreatment, the ombudsman shall immediately report the alleged incident to the Child Abuse Hotline, the facility director, and the Director of the Division of Youth Services or his or her designee, who shall be responsible for ensuring the juvenile's safety;

(13)(A) To prepare annual reports on the overall functioning of the division's ability to provide for the safety, health, education, and rehabilitation of juveniles committed to the Division of Youth Services.

(B) The report shall be submitted to:

(i) The Director of the Department of Health and Human Services and the Director of the Division of Youth Services;

- (ii) The House Interim Committee on Aging, Children and Youth, Legislative and Military Affairs;
- (iii) The Senate Interim Committee on Children and Youth;
- (iv) The judges of the juvenile divisions of circuit court; and
- (v) The Governor;

(14) To prepare annual reports comparing the court's recommendations, the treatment plans of the Division of Youth Services, and the actual services provided; and

(15) The audit and compliance process of the Division of Youth Services to verify that each juvenile has unhampered access to a grievance process that addresses the juvenile's questions, complaints, and concerns in a timely manner in accordance with policy and procedure of the Division of Youth Services or applicable statute.

(d) The ombudsman shall have no authority to command or otherwise instruct any division employee or contracted agent of the Division of Youth Services regarding any aspect of programming or operations, nor may the ombudsman alter or countermand any instruction to, or participation by, juveniles that is consistent with the policy and procedure of the Division of Youth Services or otherwise part of the treatment plan, program, or operations associated with the agency.

History. Acts 1999, No. 1580, §§ 1-6; 2001, No. 1797, § 1; 2003, No. 1008, §§ 1, 2.

Publisher's Notes. Acts 1999, No. 1580, § 7, provided: "(a) A comprehensive outside evaluation of the Juvenile Ombudsman Division shall be conducted by an independent organization with established expertise in this area in the last quarter of the fiscal year 2003 to determine the ability of the Division to carry out its purpose.

"(b) The independent organization shall be selected by the House Interim Committee on Children and Youth, Legislative and Military Affairs and the Senate Interim Committee on Children and

Youth, and the organization shall present its report to the two (2) interim committees. The organization shall provide a copy to the Director of the Department of Human Services, the Director of the Division of Youth Services, and the Executive Director of the Arkansas Public Defender Commission.

"(c) The evaluation shall be paid by the Arkansas Public Defender Commission."

Amendments. The 2001 amendment rewrote this section.

The 2003 amendment added "that are unlicensed or unaccredited" in (b)(1); inserted "unlicensed or unaccredited" in (c)(11); and made minor stylistic changes.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Practice,

Procedure, and Courts, Juvenile Ombudsman, 26 UALR L.J. 448.

SUBCHAPTER 3 — FUNDING

SECTION.

16-87-301. Transition to state funding.

16-87-302. Funding of public defenders.

SECTION.

16-87-303. Selection and qualifications of public defenders.

SECTION.

16-87-304. Distribution and placement of public defender positions.

16-87-305. Salaries of public defenders.

SECTION.

16-87-306. Duties.

16-87-307. Conflicts of interest.

A.C.R.C. Notes. References to "this chapter" in § 16-87-101 may not apply to this subchapter which was enacted subsequently.

Effective Dates. Acts 1997, No. 788, § 36 and No. 1341, § 35: became law without the Governor's signature. Noted Mar. 11, 1997 and Apr. 11, 1997, respectively. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the effectiveness of this act on July 1, 1997 is

essential to the operation of the state court system, and that in the event of an extension of the Regular Session, the delay in the effective date of this act beyond July 1, 1997 could work irreparable harm upon the proper administration and provision of essential governmental progress. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety, shall be in full force and effect from and after July 1, 1997."

16-87-301. Transition to state funding.

(a) It is the intent of the General Assembly in the transition to a state-funded public defender system to provide an appropriate and adequate level of legal representation to indigent persons in all areas of the state. It is recognized by the General Assembly that in many areas of the state, resources have not been available to support a public defender system at the necessary level. It is also recognized, however, that in other areas, a system has been developed which is appropriately and successfully serving indigent persons and the justice system. With the transition from local funding of the system to state funding of the system, it is not the intent of the General Assembly to adversely affect those systems which are working well or to put in place a system which is too inflexible to respond to local needs or restrictions.

(b) In its administration of the system, therefore, the Arkansas Public Defender Commission is charged with the authority and responsibility to establish and maintain a system of public defenders which equitably serves all areas of the state, provides quality representation, makes prudent use of state resources, and works with others in the justice system at the state and local level to provide an appropriate level of legal services to indigent persons in our state.

History. Acts 1997, No. 788, § 23; 1997, No. 1341, § 23.

Legislative intent of Acts 1997, No. 788, § 16-10-602.

Cross References. Legislative intent of Acts 1997, Nos. 788 and 1341, § 16-10-601.

16-87-302. Funding of public defenders.

(a) The Arkansas Public Defender Commission shall be responsible for the payment of the following:

(1) The salaries of public defenders;

(2) The salaries of secretaries and other support staff of the public defender's office;

(3) The payment of the costs of certain expenses, as authorized by § 16-87-212.

(b) Each county or counties within a judicial district shall be responsible for the payment of the following:

(1) The cost of facilities, equipment, supplies, and other office expenses necessary to the effective and efficient operation of the public defender's office; and

(2) The compensation of additional personnel within the office of the public defender, when approved in advance by the quorum court.

History. Acts 1997, No. 788, § 12; 1997, No. 1341, § 12; 2001, No. 1799, § 8.

Publisher's Notes. As amended in 2001, this section provided: "(a) Effective July 1, 2001, The Arkansas Public Defender Commission shall be responsible for the payment of the following: (1) The salaries of public defenders; (2) The salaries of secretaries and other support staff of the public defender's office; (3) The payment of the costs of certain expenses, as authorized by § 16-87-212.

"(b) Effective July 1, 2001, Each county or counties within a judicial district shall be responsible for the payment of the following: (1) The cost of facilities, equipment, supplies, and other office expenses

necessary to the effective and efficient operation of the public defender's office; and (2) The compensation of additional personnel within the office of the public defender, when approved in advance by the quorum court."

Amendments. The 2001 amendment substituted "July 1, 2001" for "January 1, 1998" in (a); substituted "July 1, 2001" for "January 1, 1998" in (b); inserted "necessary to the effective and efficient" in (b)(1); and made minor stylistic changes.

Cross References. Legislative intent of Acts 1997, Nos. 788 and 1341, § 16-10-601.

Transition to state funding, § 16-87-301.

16-87-303. Selection and qualifications of public defenders.

(a) Each person selected as a public defender shall be:

(1) Licensed to practice law in the State of Arkansas; and

(2) Experienced in the defense of criminal cases.

(b)(1) Any person interested in being considered for appointment as a public defender in a judicial district shall submit his or her name to the Arkansas Public Defender Commission.

(2)(A) The commission shall evaluate and submit up to three (3) names to the judges within the judicial district.

(B) By majority vote, the judges will select one (1) of the candidates whose name was submitted by the commission as the public defender.

(C) If one (1) of the candidates submitted does not receive a majority vote from the judges, then the commission shall select the public defender.

(c)(1) The public defender in each judicial district shall be appointed for a term of two (2) years and shall be removed by the commission before the expiration of his or her term only for just cause.

(2) Just cause for removal shall consist of permanent physical or mental disability seriously interfering with the performance of duties, willful misconduct in office, willful and persistent failure to perform

public defender duties, habitual intemperance, or conduct prejudicial to the administration of justice.

(d) The public defender shall be eligible for reappointment.

(e) Vacancies in the office shall be filled in the same manner as the initial appointment.

History. Acts 1997, No. 788, § 13; 1997, No. 1341, § 13; 2001, No. 1799, § 9.

Publisher's Notes. As amended in 2001, subdivision (c)(1) provided: "Beginning January 1, 1998, The public defender in each judicial district shall be appointed for a term of two (2) years and shall be removed by the commission before the expiration of his or her term only for just cause."

Amendments. The 2001 amendment rewrote (b)(2); made a minor stylistic change in (c)(1); and made gender neutral changes throughout this section.

Cross References. Legislative intent of Acts 1997, Nos. 788 and 1341, § 16-10-601.

Transition to state funding, § 16-87-301.

16-87-304. Distribution and placement of public defender positions.

(a) There shall be created within the Arkansas Public Defender Commission a number of positions, including chief public defenders, public defenders, investigators, and secretaries.

(b)(1) The commission shall allocate positions to each county or judicial district based on an appropriate formula adopted by the commission.

(2) In the distribution of positions, the commission shall be guided by:

(A) The current distribution and type of positions across the state;

(B) An evaluation of court case filings and dispositions, the number of judges, the size and population of the county or district, and other appropriate factors; and

(C) The desire to avoid the necessity of appointing outside public defenders or private counsel due to conflicts of interest.

(c)(1) There shall be at least one (1) public defender position allocated to each judicial district.

(2)(A) Where appropriate, a position or positions may be assigned to a single county.

(B) In counties where more than one (1) position is allocated, the commission may designate one (1) or more of the positions as chief public defender.

(3)(A) When one (1) or more chief public defenders is assigned to a county or judicial district and the chief public defender shall have administrative authority over other public defenders within the county or district, the chief public defender may select the other public defenders subject to the approval of the commission.

(4)(A) Public defender positions may be allocated on a full-time or part-time basis.

(B) When a public defender is employed on a part-time basis, he or she may engage in the general practice of law.

(C) No person who serves as a full-time public defender may engage in the private practice of law.

(D) No person shall serve as a part-time public defender who also serves as a part-time municipal court judge, city court judge, or deputy prosecuting attorney in any judicial district.

History. Acts 1997, No. 788, § 14; 1997, No. 1341, § 14; 2001, No. 1799, § 10.

A.C.R.C. Notes. Acts 1997, Nos. 778, § 14, and 1341, § 14, also provided: “(d)(1) The commission shall develop the initial allocation of public defender positions to all counties and judicial districts on or before August 1, 1997.

“(d)(2) The plan shall be reviewed by the House and Senate Interim Committees on Judiciary on or before October 1, 1997.”

Effective Dates. The provisions of this section are effective January 1, 1998, by its own terms.

Amendments. The 2001 amendment rewrote (c)(3)-(4).

Cross References. Legislative intent of Acts 1997, Nos. 788 and 1341, § 16-10-601.

Transition to state funding, § 16-87-301.

16-87-305. Salaries of public defenders.

(a) The entry level salaries of public defenders and public defender staff positions shall be consistent with that established by the state pay plan for the appropriate grade of each position.

(b) The public defenders and public defender staff positions shall be subject to the Uniform Attendance and Leave Policy Act, § 21-4-201 et seq.

History. Acts 1997, No. 788, § 15; 1997, No. 1341, § 15; 1999, No. 1488, § 1.

A.C.R.C. Notes. Acts 1999, No. 1488, § 1, provided, in part: “Public defender attorneys and employees of public defender offices who were converted from county or grant-funded employment to state employment and were employed as of January 2, 1998, shall have their length

of service with a county recognized for purposes of calculating accrual rates for sick leave and annual leave.”

Cross References. Legislative intent of Acts 1997, Nos. 788 and 1341, § 16-10-601.

Transition to state funding, § 16-87-301.

16-87-306. Duties.

The public defender in each judicial district shall have the following duties:

(1)(A) To defend indigents within the district as determined by the circuit, municipal, or juvenile courts in the district in all:

(i) Felony, misdemeanor, juvenile, guardianship, and mental health cases;

(ii) Traffic cases punishable by incarceration; and

(iii) Contempt proceedings punishable by incarceration.

(B) Except for juvenile representation in family in need of services cases, in no case may a public defender be appointed or the commission be responsible for payment where there is no risk of incarceration or loss of liberty; and

(2)(A) In all capital cases where the death penalty is sought, two (2) attorneys shall be appointed, unless the prosecuting attorney informs the circuit court at the arraignment of the defendant that the death penalty will not be sought.

(B) The Capital, Conflicts, and Appellate Office of the Arkansas Public Defender Commission may be appointed, consistent with § 16-87-205.

(C) It should be presumed for purposes of this section that the death penalty will be sought.

History. Acts 1997, No. 788, § 16; 1997, No. 1341, § 16; 2001, No. 1799, § 11.

Amendments. The 2001 amendment, in present (1)(A), deleted "city, police" following "circuit, municipal" and made minor stylistic changes; and added (1)(B).

Cross References. Legislative intent of Acts 1997, Nos. 788 and 1341, § 16-10-601.

Transition to state funding, § 16-87-301.

CASE NOTES

ANALYSIS

Attorney fees.
Postconviction proceedings.
Purpose.

Attorney Fees.

Defendant counsel's petition for payment of attorney fees for his work on defendant's appeal, despite his employment as a full-time public defender, was denied because subsection (c) of this rule applies only to appointed counsel not otherwise paid and Arkansas Criminal Rule of Appellate Procedure, Rule 16, requires all counsel to represent defendants through their direct appeal unless relieved. *Rushing v. State*, 340 Ark. 84, 8 S.W.3d 489 (2000).

Postconviction Proceedings.

Ark. R. Crim. P. Rule 37 proceedings are

civil in nature and, therefore, a trial court is without authority to require the Public Defender Commission to pay attorney's fees in such a proceeding. *Arkansas Pub. Defender Comm'n v. Greene County Circuit Court*, 343 Ark. 49, 32 S.W.3d 470 (2000).

Purpose.

The purpose of § 16-10-307 and this section is to provide representation for indigents in cases in which there is a potential for loss of liberty, but the provision of § 14-20-102 that grants authority for the trial court to appoint attorneys for minors in civil litigation to be paid by county funds, was not incorporated in the statutes establishing and defining the duties and responsibilities of the Commission. *Arkansas Pub. Defender Comm'n v. Burnett*, 340 Ark. 233, 12 S.W.3d 191 (2000).

16-87-307. Conflicts of interest.

(a) If a court determines that a conflict of interest exists between an indigent person and a public defender, the case shall be reassigned as follows:

(1) If there is within the county or judicial district another public defender, the appointment of whom would not create a conflict of interest, the judge shall appoint that public defender to defend the person;

(2) If there is no other public defender within the county or judicial district eligible to represent the person, the judge shall notify the

Arkansas Public Defender Commission, which may appoint a public defender from an adjacent area; or

(3) A private attorney may be appointed by the judge who shall notify in writing the commission of the appointment, the type of case, and the reason for the appointment within twenty (20) days of the appointment.

(b) The commission shall continue to maintain a list of private attorneys based upon their qualifications for acceptance of appointment.

(c)(1) A list for each judicial district shall be prepared, certified, and updated annually by the commission.

(2) A separate list of attorneys throughout the state qualified and willing to accept appointment as lead counsel in capital cases shall be prepared, certified, and updated annually by the commission.

(3) The commission shall create a second list of attorneys who may be appointed to assist the lead counsel.

(4) The commission shall create and maintain a list of attorneys who are qualified and willing to accept appointment as lead counsel in actions under Rule 37.5 of the Arkansas Rules of Criminal Procedure.

History. Acts 1997, No. 788, § 20; 1997, No. 1341, § 20; 2001, No. 1799, § 12; 2003, No. 605, § 1.

Amendments. The 2001 amendment rewrote (a)(3); and added (b) and (c).

The 2003 amendment added (c)(4).

Cross References. Legislative intent of Acts 1997, Nos. 788 and 1341, § 16-10-601.

Transition to state funding, § 16-87-301.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Practice, Procedure, and Courts, Post-Conviction

Hearings in Capital Cases, 26 UALR L.J. 441.

CHAPTER 88

JURISDICTION AND VENUE

SUBCHAPTER

1. GENERAL PROVISIONS.
2. CHANGE OF VENUE.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 16-88-101. Jurisdiction of courts for certain offenses generally.
- 16-88-102. Restraint of inferior courts.
- 16-88-103. [Repealed.]
- 16-88-104. Presumption of jurisdiction.
- 16-88-105. Territorial jurisdiction of certain courts generally.
- 16-88-106. Mississippi River — Jurisdictional boundaries.

SECTION.

- 16-88-107. St. Francis River — Jurisdictional boundaries.
- 16-88-108. Jurisdiction of counties — Offenses generally.
- 16-88-109. Jurisdiction of counties — Importing property into state.
- 16-88-110. Jurisdiction of counties — Kidnapping.

SECTION.

- 16-88-111. Jurisdiction of counties — Offense committed on boat or vessel.
- 16-88-112. Jurisdiction of counties — Mortal wound.
- 16-88-113. Jurisdiction of counties — Stolen property.

SECTION.

- 16-88-114. Jurisdiction of counties — Accessories to felonies.
- 16-88-115. Katie's Law.
- 16-88-116. Traffic citations issued within a municipality with a municipal court or a city court — Placement on docket.

Cross References. Aircraft, commission of crimes governed by state law, § 27-116-301.

Fresh pursuit laws, § 16-81-301 et seq.

Lack of jurisdiction during trial, § 16-89-119.

Preambles. Acts 1909, No. 290, contained a preamble which read: "Whereas, The criminal jurisdiction of the State of Arkansas only extends to and follows the meanders of the west bank of the Mississippi River, and,

"Whereas, There are numerous crimes committed on the Mississippi River over which Arkansas and her sister States on the east bank of said river have no criminal jurisdiction and it is almost impossible

to bring criminals operating along either bank of said river to justice ..."

Acts 1911, No. 81, contained a preamble which read: "Whereas, The criminal jurisdiction of the State of Arkansas only extends to and follows the meanders of the west bank of the St. Francis River; and,

"Whereas, There are numerous crimes committed on the St. Francis River over which Arkansas and her sister state on the east bank of said river have no criminal jurisdiction and it is almost impossible to bring criminals operating along either bank of said river to justice ..."

Effective Dates. Acts 1903, No. 168, § 2: effective on passage.

RESEARCH REFERENCES

ALR. Adequacy of defense counsel's representation of criminal client regarding venue and recusation matters. 7 ALR 4th 942.

Am. Jur. 21 Am. Jur. 2d, Crim. L., § 336 et seq.

C.J.S. 22 C.J.S., Crim. L., § 107 et seq.

Ark. L. Notes. Watkins, A Guide to Arkansas Venue, 1995 Ark. L. Notes 83.

16-88-101. Jurisdiction of courts for certain offenses generally.

(a) The jurisdiction of the various courts of this state for the trial of offenses shall be as follows:

- (1) The Senate shall have exclusive jurisdiction of impeachment;
- (2) The Supreme Court shall have general supervision and control over all inferior courts in criminal cases;
- (3) The circuit court shall have original jurisdiction, exclusive of the district court and city court, for the trial of offenses defined as felonies by state law and shall have original jurisdiction concurrent with the district court and city court for the trial of offenses defined as misdemeanors by state law.
- (4) The district court shall have original jurisdiction, exclusive of the circuit court, for the trial of violations of ordinances of the city or county in which the district court is located and shall have original jurisdiction concurrent with the circuit court for the trial of offenses defined as

misdemeanors by state law and committed within the territorial jurisdiction of the district court.

(5) The city court shall have original jurisdiction, exclusive of the circuit court, for the trial of violations of ordinances of the city in which the city court is located and shall have original jurisdiction concurrent with the circuit court for the trial of offenses defined as misdemeanors by state law and committed within the city in which the circuit court is located.

(b) Where an indictment is found in the circuit court for an offense within its jurisdiction, the court shall have jurisdiction of all the degrees of the offense, and of all the offenses included in the one (1) charge, although some of those degrees or included offenses are within the exclusive jurisdiction of an inferior or local court.

(c) A district court may issue arrest warrants and search warrants and may perform other pretrial functions, as authorized by the Arkansas Rules of Criminal Procedure, in the prosecution of a person for an offense within the exclusive jurisdiction of the circuit court.

History. Crim. Code, §§ 10, 11; Acts 1871, No. 49, § 1 [10], p. 255; C. & M. Dig., § 2863; Pope's Dig., § 3679; A.S.A. 1947, §§ 43-1405, 43-1406; Acts 2003, No. 1185, § 207; 2003, No. 1185, §§ 207, 208.

Amendments. The 2003 amendment by No. 1185, § 207, rewrote the section.

The 2003 amendment by No. 1185, § 208, rewrote (a).

CASE NOTES

ANALYSIS

Municipal courts.
Police courts.

Municipal Courts.

Although municipal courts have county-wide jurisdiction of misdemeanors, that jurisdiction is concurrent with that of the justices of the peace in all townships except the township in which the municipal court sits. Therefore, only in the township in which the municipal court sits is its jurisdiction exclusive of the jurisdiction of justices of the peace. *Credit v. State*, 25 Ark. App. 309, 758 S.W.2d 10 (1988).

Police Courts.

The chancery court has no jurisdiction over police court's use of bail money; rather than appealing to the circuit court the police court's decision foreclosing on and attaching the disputed funds and applying them to defendant's fine, plaintiff improperly filed suit in chancery court attempting to countermand the police court's order by enjoining the city's use of plaintiff's funds. *Skelton v. City of Atkins*, 317 Ark. 28, 875 S.W.2d 504 (1994), (decision under prior law).

Cited: *Taylor v. State*, 354 Ark. 450, 125 S.W.3d 174 (2003).

16-88-102. Restraint of inferior courts.

The circuit court of any county or the judge thereof, exercising jurisdiction in vacation, may by writ of prohibition restrain all other inferior courts in the limits of the county from exceeding their criminal jurisdiction.

History. Crim. Code, § 22; Acts 1903, No. 168, § 1, p. 325; C. & M. Dig., § 2884; Pope's Dig., § 3700; A.S.A. 1947, § 43-1425.

Cross References. Jurisdiction to hear mandamus and prohibition writs, § 16-115-102.

16-88-103. [Repealed.]

Publisher's Notes. This section, concerning removal of cases in circuit court to city, magistrate's or police courts, was repealed by Acts 2003, No. 1185, § 209. The section was derived from the follow-

ing sources: Crim. Code, §§ 12, 13; C. & M. Dig., §§ 2867, 2868; Pope's Dig., §§ 3683, 3684; A.S.A. 1947, §§ 43-1410, 43-1411.

16-88-104. Presumption of jurisdiction.

It shall be presumed upon trial that the offense charged was committed within the jurisdiction of the court, and the court may pronounce the proper judgment accordingly unless the evidence affirmatively shows otherwise.

History. Init. Meas. 1936, No. 3, § 26, Acts 1937, p. 1384; A.S.A. 1947, § 43-1426; Acts 2003, No. 1185, § 210.

Amendments. The 2003 amendment

deleted "in the indictment" following "offense charged."

Cross References. Burden of proof, § 5-1-111.

RESEARCH REFERENCES

Ark. L. Rev. Use of Presumptions in Arkansas, 4 Ark. L. Rev. 128.

CASE NOTES

ANALYSIS

Applicability.
Allegation.
Evidence.
Proof.

Applicability.

Where informations affirmatively alleged that crimes occurred in one county, statutory presumption that the crime was committed within the court's jurisdiction was inapplicable when case was prosecuted in another county. *Williams v. Turner*, 255 Ark. 907, 503 S.W.2d 901 (1974).

Allegation.

Under this section it is unnecessary to allege the venue of the offense. *Meador v. State*, 201 Ark. 1083, 148 S.W.2d 653 (1941); *Ward v. State*, 203 Ark. 1024, 160 S.W.2d 864 (1942).

Evidence.

Evidence sufficient to establish venue. *Pickens v. State*, 198 Ark. 916, 132 S.W.2d 10 (1939); *Ahart v. State*, 200 Ark. 1082,

143 S.W.2d 23 (1940); *Kasinger v. State*, 234 Ark. 788, 354 S.W.2d 718 (1962).

Venue held proper where no affirmative evidence to the contrary was established. *McGhee v. State*, 214 Ark. 221, 215 S.W.2d 135 (1948); *Stewart v. State*, 214 Ark. 497, 216 S.W.2d 873 (1949); *Milam v. State*, 253 Ark. 651, 488 S.W.2d 16 (1972).

Proof.

Trial court did not err in refusing to give instructions requiring the state to prove the venue. *Cecil v. State*, 234 Ark. 129, 350 S.W.2d 614 (1961).

The state did not have to prove the crime was committed in the forum county. *Johnson v. State*, 254 Ark. 703, 495 S.W.2d 845 (1973).

The state was not required in its case-in-chief to prove that the trial was being held in the county in which the crime was committed. *James v. State*, 280 Ark. 359, 658 S.W.2d 382 (1983).

Cited: *Ahart v. State*, 200 Ark. 1082, 143 S.W.2d 23 (1940); *Wise v. State*, 204 Ark. 743, 164 S.W.2d 897 (1942); *Hill v. State*, 253 Ark. 512, 487 S.W.2d 624 (1972); *Taylor v. State*, 334 Ark. 339, 974 S.W.2d 454 (1998).

16-88-105. Territorial jurisdiction of certain courts generally.

(a) The jurisdiction of the Senate and Supreme Court embraces the whole state.

(b) The local jurisdiction of circuit courts and justices' courts shall be of offenses committed within the respective counties in which they are held.

(c) The local jurisdiction of police or city courts shall be of offenses committed within the limits of the jurisdiction of the courts, as prescribed by the statutes creating or regulating them.

History. Crim. Code, §§ 14-16; C. & M. Dig., §§ 2864-2866; Pope's Dig., §§ 3680-3682; A.S.A. 1947, §§ 43-1407 — 43-1409.

A.C.R.C. Notes. Amendment 80 to the Arkansas Constitution, adopted by voter referendum and effective July 1, 2001, in § 19(B)(2), provided: "District Courts shall have the jurisdiction vested in Municipal Courts, Corporation Courts, Police Courts, Justice of the Peace Courts, and Courts of Common Pleas at the time this Amendment takes effect. District Courts shall assume the jurisdiction of these

courts of limited jurisdiction and other jurisdiction conferred in this Amendment on January 1, 2005. City Courts shall continue in existence after the effective date of this Amendment unless such City Court is abolished by the governing body of the city or by appropriate action of the General Assembly. Immediately upon abolition of such City Court, the jurisdiction of the City Court shall vest in the nearest District Court in the county where the city is located."

CASE NOTES

ANALYSIS

In general.
Circuit court.
Mayor's courts.
Proof.
Venue.

In General.

The constitution and applicable statutes provide that a circuit judge may act in a criminal case only when he is within the geographical area of the judicial district in which the charge is filed. *State v. Vaughan*, 343 Ark. 293, 33 S.W.3d 512 (2000).

Circuit Court.

This section, § 16-13-210 and Ark. Const., Art. 7, § 13 provide that a circuit judge may act in a criminal case only when he is within the geographical area of the judicial district in which the charge is filed. *Waddle v. Sargent*, 313 Ark. 539, 855 S.W.2d 919 (1993).

Defendant's territorial jurisdictional claim was dismissed where he presented no positive evidence that the offense occurred anywhere other than in the county of the circuit court in which it was filed.

Cates v. State, 329 Ark. 585, 952 S.W.2d 135 (1997).

Circuit Court in Jefferson County had jurisdiction to enter a judgment convicting defendant of a rape that occurred in Arkansas County where the offense was a continuing episode that began with the kidnapping of the female victim by two men in Jefferson County and ended with the gang rape of the victim in Arkansas County by defendant and several accomplices; the fact that defendant was acquitted of the offense that occurred in Jefferson County did not deprive the circuit court of jurisdiction. *Cloird v. State*, 352 Ark. 190, 99 S.W.3d 419 (2003).

Mayor's Courts.

Mayor's court has jurisdiction of offenses committed within the city limits, but has powers of process throughout the county. *Lee v. Watts*, 243 Ark. 957, 423 S.W.2d 557 (1968).

Proof.

Before the state is called upon to offer evidence on the question of jurisdiction, there must be positive evidence that the offense occurred outside the jurisdiction of the court. *Richards v. State*, 279 Ark. 219, 650 S.W.2d 566 (1983).

Although the murder instrument was found in a county other than where the crime was prosecuted and a police chief who investigated the crime testified it was his opinion that the victim had been killed in that other county, but he did not state his basis for that opinion, there was no positive evidence from which a juror could say where the crime occurred; therefore, the state did not have the burden to prove that the crime occurred in the county

where it was prosecuted. *Dix v. State*, 290 Ark. 28, 715 S.W.2d 879 (1986).

Venue.

Pursuant to subsection (c), where some of the acts requisite to the murder occurred within the county, venue was properly laid in the county. *Patterson v. State*, 306 Ark. 385, 815 S.W.2d 377 (1991).

Cited: *Cableton v. State*, 243 Ark. 351, 420 S.W.2d 534 (1967).

16-88-106. Mississippi River — Jurisdictional boundaries.

(a) The criminal jurisdiction of the State of Arkansas is extended as follows:

Beginning at a point where the north boundary line of Arkansas intersects the west bank of the Mississippi River and extending east along a line in extension of and parallel to the said north boundary of Arkansas to the east bank of the said Mississippi River; thence south along the bank, and following the meandering thereof to a point where a line drawn east along and parallel to the south boundary of Arkansas would intersect the east bank of the Mississippi River, thence west along that line to a point where the south boundary line of Arkansas intersects the west bank of the Mississippi River.

(b) The State of Arkansas and her sister states, Tennessee and Mississippi, have concurrent criminal jurisdiction over the parts of the territory lying opposite them and between the lines extending and parallel to their north and south boundaries.

History. Acts 1909, No. 290, §§ 1, 2, p. 888; C. & M. Dig., §§ 2860, 2861; Pope's Dig., §§ 3676, 3677; A.S.A. 1947, §§ 43-1401, 43-1402.

Publisher's Notes. Acts 1909, No. 290, § 3, provided that the act would be in

force when either Tennessee or Mississippi passed a similar act governing the territory described. Similar acts were passed by Mississippi April 12, 1910 and by Tennessee May 17, 1915.

CASE NOTES

Concurrent Jurisdiction.

In murder prosecution, where victim's body was found floating in the middle of the Mississippi River between Arkansas and Tennessee, courts of both states had concurrent jurisdiction where the crime was committed on the river. *Padgett v. State*, 151 Ark. 290, 236 S.W. 603 (1922).

The concurrent jurisdiction which two states may have over the width of a river,

the center of which forms the territorial boundaries of the states, is not to be construed as giving one state authority to punish violations of its fish laws occurring beyond its side of the river, if such act is duly authorized by the neighboring state. *State v. Alexander*, 222 Ark. 376, 259 S.W.2d 677 (1953).

Cited: *Means v. State*, 118 Ark. 362, 176 S.W. 309 (1915).

16-88-107. St. Francis River — Jurisdictional boundaries.

(a) The criminal jurisdiction of the State of Arkansas is extended as follows:

Beginning at a point where the north boundary line of Arkansas intersects the west meander line of the St. Francis River and running east on an extension of the north boundary line to the meander line on the east bank of the river; thence south with the meander line of the river to the point where the meander line intersects the south boundary line of the State of Missouri; thence west on an extension of the south line of Missouri to the meander line on the west bank of the river; thence north with the meander line of the river to the point of beginning.

(b) The State of Arkansas and her sister state, Missouri, have concurrent criminal jurisdiction over the parts of the territory lying opposite them and between the lines extending and parallel to their north and south boundaries.

History. Acts 1911, No. 81, §§ 1, 2; C. & M. Dig., §§ 2857, 2858; Pope's Dig., §§ 3673, 3674; A.S.A. 1947, §§ 43-1403, 43-1404.

Publisher's Notes. Acts 1911, No. 81,

§ 3, provided that the act would be in force when Missouri passed a similar act. A similar act was passed by Missouri March 30, 1911.

CASE NOTES

ANALYSIS

East of main channel.
Islands.

East of Main Channel.

Defendant properly charged in Arkansas for offense occurring east of middle of channel. *Brown v. State*, 109 Ark. 373, 159 S.W. 1132 (1913).

Islands.

Jurisdiction of the criminal courts of this state is not extended to islands which are situated on the Missouri side of the main channel. *Goodman v. State*, 153 Ark. 560, 240 S.W. 735 (1922).

16-88-108. Jurisdiction of counties — Offenses generally.

(a) When any offense may be committed on the boundary of two (2) counties or where the person committing the offense may be on one side and the injury is done on the other side of the boundary, the indictment may be found and the trial and conviction thereon had in either of the counties. If it is uncertain where the boundary is, the indictment may be found and a trial had in either county.

(b) Where a river is the boundary between two (2) counties, the criminal jurisdiction of each county shall embrace offenses committed on the river or any island thereof.

(c) Where the offense is committed partly in one county and partly in another or the acts or effects thereof requisite to the consummation of the offense occur in two (2) or more counties, the jurisdiction is in either county.

History. Rev. Stat., ch. 45, § 93; Crim. Code, §§ 17, 18; C. & M. Dig., §§ 2869, 2874, 2875; Pope's Dig., §§ 3685, 3690,

3691; A.S.A. 1947, §§ 43-1412, 43-1413, 43-1414.

CASE NOTES

ANALYSIS

Constitutionality.
Construction.
Purpose.
Burden of proof.
Conspiracy.
Crime on boundary.
Joinder of charges.
Location of property.
Offenses in more than one county.
Venue.

Constitutionality.

This section is not violative of the Constitution as to crimes committed on the boundary line between two counties or when there is uncertainty as to the location of the boundary. *State v. Rhoda*, 23 Ark. 156 (1861); *Jones v. State*, 54 Ark. 371, 15 S.W. 1026 (1891).

Subsection (b) of this section is a valid exercise of legislative power. *Contra Cox v. State*, 68 Ark. 462, 60 S.W. 27 (1900); *Bottom v. State*, 155 Ark. 113, 244 S.W. 334 (1922).

Construction.

Subsection (c) of this section is to be liberally construed. *Hill v. State*, 253 Ark. 512, 487 S.W.2d 624 (1972).

Purpose.

Subsection (c) of this section was remedial, intended to prevent miscarriages of justice by extending the lines of jurisdiction beyond the limits prescribed by the common law. *Hill v. State*, 253 Ark. 512, 487 S.W.2d 624 (1972).

Burden of Proof.

Before the state is called upon to offer any evidence of jurisdiction, there must be positive evidence that the offense occurred outside the jurisdiction of the court. *Nicholson v. State*, 319 Ark. 566, 892 S.W.2d 507 (1995).

Conspiracy.

Proper venue for a conspiracy prosecution is any county where an overt act in furtherance of the conspiracy is alleged to have occurred. *Lee v. State*, 27 Ark. App. 198, 770 S.W.2d 148 (1989), cert. denied, 493 U.S. 847, 110 S. Ct. 142, 107 L. Ed. 2d 101 (1989).

Crime on Boundary.

Instruction that, if an offense is commit-

ted upon the boundary of two counties or if it is uncertain where the boundary is, a conviction may be had in either county is erroneous where there is no proof that the offense was committed upon the boundary of the two counties or that there is uncertainty about the location of the boundary. *Jones v. State*, 54 Ark. 371, 15 S.W. 1026 (1891).

Crime committed on a boat fastened to the bank of a stream on the boundary line is within the jurisdiction of either county. *Bottom v. State*, 155 Ark. 113, 244 S.W. 334 (1922).

Joinder of Charges.

Where the kidnapping occurred in Washington County, continued into Madison County, and culminated with a rape in Madison County, both counties had jurisdiction and venue over both the kidnapping and rape charges, as they arose from the same continuing course of conduct. Thus, ARCrP 21.3 required the judge to grant the defense motion to join the charges in one trial, and when joinder was denied, the latter conviction had to be reversed and the charge dismissed. *Cozzaglio v. State*, 289 Ark. 33, 709 S.W.2d 70 (1986).

Where defendant did not request joinder of separate charges relating to separate crimes committed in one continuous episode in different counties, joinder was not required. *Wilson v. State*, 298 Ark. 608, 770 S.W.2d 123 (1989).

Location of Property.

In prosecution for disposing of property subject to a lien, circuit court in county in which case was heard had jurisdiction under this section, it appearing that the property in question, cattle, was situated in that county, notwithstanding that the acts with reference to disposal of the cattle took place in another county. *Hill v. State*, 253 Ark. 512, 487 S.W.2d 624 (1972).

Offenses in More Than One County.

Where the offense of kidnapping occurred in one county and culminated in the aggravated robbery of the victim in another county, the first county had jurisdiction to try the defendant for both kidnapping and robbery. *Ellis v. State*, 291 Ark. 72, 722 S.W.2d 575 (1987).

Where robbery plan was hatched in one

county and the disguise and weapon were obtained there, and the murder and robbery occurred in a second county, but the body was returned to the first, jurisdiction was in either county, and venue was thus properly laid in the first county. *Thrash v. State*, 291 Ark. 575, 726 S.W.2d 283 (1987).

Defendant's double jeopardy argument rejected where defendant's convictions for incest in one county were not for the same offense committed in another county, and where the offenses in the former county were not based on the same conduct for which he was convicted in the latter county. *Fletcher v. State*, 53 Ark. App. 135, 920 S.W.2d 42 (1996).

The county in which a chase began had jurisdiction over a charge of fleeing, notwithstanding the defendant's contention that he was actually chasing the police while in that county and that he did not have an intent to flee until the chase moved to another county. *Barr v. State*, 336 Ark. 220, 984 S.W.2d 792 (1999).

Jurisdiction in a prosecution for Medicaid fraud was properly found to be in Pulaski County, notwithstanding that the defendant's dental practice was in Pine Bluff and that his billings occurred there, since his Medicaid billings were submitted to a state agency in Little Rock for payment and his claims were denied or authorized there. *Blackwell v. State*, 338 Ark. 671, 1 S.W.3d 399 (1999).

In a prosecution for hindering appre-

hension or prosecution, jurisdiction was proper either in the county in which the defendant volunteered false information to the police with regard to a murder under investigation or in the county in which the murder occurred and in which the investigation was ongoing. *State v. Osborn*, 345 Ark. 196, 45 S.W.3d 373 (2001).

Circuit Court in Jefferson County had jurisdiction to enter a judgment convicting defendant of a rape that occurred in Arkansas County where the offense was a continuing episode that began with the kidnapping of the female victim by two men in Jefferson County and ended with the gang rape of the victim in Arkansas County by defendant and several accomplices; the fact that defendant was acquitted of the offense that occurred in Jefferson County did not deprive the circuit court of jurisdiction. *Cloird v. State*, 352 Ark. 190, 99 S.W.3d 419 (2003).

Venue.

Pursuant to subsection (c), where some of the acts requisite to the murder occurred within the county, venue was properly laid in the county. *Patterson v. State*, 306 Ark. 385, 815 S.W.2d 377 (1991).

Cited: *Williams v. Turner*, 255 Ark. 907, 503 S.W.2d 901 (1974); *Hickerson v. State*, 282 Ark. 217, 667 S.W.2d 654 (1984); *Shaw v. State*, 299 Ark. 474, 773 S.W.2d 827 (1989); *Pilcher v. State*, 303 Ark. 335, 796 S.W.2d 845 (1990).

16-88-109. Jurisdiction of counties — Importing property into state.

(a) Where the offense consists of importing any property into the state, the jurisdiction shall be in any county into which the offender imports the property.

(b) Whenever two (2) or more counties have jurisdiction of the same offense by this section, the county in which the defendant is first arrested shall proceed to try the offense, to the exclusion of others.

History. Crim. Code, §§ 19, 21; C. & M. Dig., §§ 2876, 2878; Pope's Dig., §§ 3692, 3694; A.S.A. 1947, §§ 43-1415, 43-1417.

CASE NOTES

Selection of Forum.

The state may elect in which county the offense may be prosecuted when jurisdiction is concurrent, and the right of selec-

tion of the forum continues until there is a final judgment; consequently, the effect of a second indictment in another county having jurisdiction in the same judicial

district is to effect a relinquishment of the jurisdiction in the county where first indictment was returned. *Bottom v. State*, 155 Ark. 113, 244 S.W. 334 (1922).

Cited: *Ronning v. State*, 295 Ark. 228, 748 S.W.2d 633 (1988).

16-88-110. Jurisdiction of counties — Kidnapping.

(a) Where the offense consists of kidnapping, seizing, or confining a person without lawful authority, the jurisdiction shall be in the county in which the kidnapping, seizing, or confining was committed, or in any county in which it was continued.

(b) Whenever two (2) or more counties have jurisdiction of the same offense by this section, the county in which the defendant is first arrested shall proceed to try the offense, to the exclusion of the others.

History. *Crim. Code*, §§ 20, 21; *C. & M. Dig.*, §§ 2877, 2878; *Pope's Dig.*, §§ 3693, 3694; *A.S.A.* 1947, §§ 43-1416, 43-1417.

CASE NOTES

ANALYSIS

Multiple crimes.
Selection of forum.

Multiple Crimes.

In a prosecution for capital murder where the victim was kidnapped in one county and murdered in another, venue was proper where the murder occurred. *Fairchild v. State*, 284 Ark. 289, 681 S.W.2d 380 (1984), cert. denied, 471 U.S. 1111, 105 S. Ct. 2346, 85 L. Ed. 2d 862 (1985).

Circuit Court in Jefferson County had jurisdiction to enter a judgment convicting defendant of a rape that occurred in Arkansas County where the offense was a continuing episode that began with the kidnapping of the female victim by two men in Jefferson County and ended with

the gang rape of the victim in Arkansas County by defendant and several accomplices; the fact that defendant was acquitted of the offense that occurred in Jefferson County did not deprive the circuit court of jurisdiction. *Cloird v. State*, 352 Ark. 190, 99 S.W.3d 419 (2003).

Selection of Forum.

The state may elect in which county the offense may be prosecuted when jurisdiction is concurrent, and the right of selection of the forum continues until there is a final judgment; consequently, the effect of a second indictment in another county having jurisdiction in the same judicial district is to effect a relinquishment of the jurisdiction in the county where first indictment was returned. *Bottom v. State*, 155 Ark. 113, 244 S.W. 334 (1922).

16-88-111. Jurisdiction of counties — Offense committed on boat or vessel.

When any offense may have been committed within this state on board any steamboat, flatboat, keelboat, or other vessel in the course of any voyage or trip, an indictment for the offense may be found and a trial and conviction on the offense had in any county through which or any part of which the boat or vessel passed in the course of the same voyage or trip, and with like effect as in the county in which the offense was committed.

History. Rev. Stat., ch. 45, § 92; C. & M. Dig., § 2873; Pope's Dig., § 3689; A.S.A. 1947, § 43-1418.

16-88-112. Jurisdiction of counties — Mortal wound.

If any wound or mortal injury is inflicted on any human being in this state, who shall die thereof in another state or country, whether the state or country is within the jurisdiction of the United States or not, an indictment may be found. A trial and conviction thereon may be had in the county in which the wound or mortal injury was given or inflicted in all respects as if the death had happened in the county.

History. Rev. Stat., ch. 45, § 96; C. & M. Dig., § 2879; Pope's Dig., § 3695; A.S.A. 1947, § 43-1419.

16-88-113. Jurisdiction of counties — Stolen property.

(a) When any person is liable to be prosecuted as the receiver of any personal property that may have been feloniously stolen, taken, or embezzled, he or she may be indicted, tried, and convicted in any county where he or she received or had the property, notwithstanding that the larceny may have been committed in another county.

(b) When property stolen in one county and brought into another has been taken by burglary or robbery, the offender may be indicted, tried, and convicted for the burglary or robbery in the county into which the stolen property was taken, in the same manner as if the burglary or robbery had been committed in that county.

(c)(1) Every person who steals or obtains by robbery the property of another in any other state or country, whether or not the state or country is within the jurisdictional limits of the United States, and who brings the property within this state, may be indicted, tried, and punished for larceny in the same manner as if the property had been feloniously stolen or taken within this state. In any case, the larceny may be charged to have been committed in any country into or through which the stolen property may have been taken.

(2) Every person prosecuted under the provisions of this section may plead a former conviction or acquittal for the same offense in another state or country. If the plea is admitted or established, it shall be a bar to any other or further proceedings against the person for the same matter.

History. Rev. Stat., ch. 45, §§ 91, 99, 3696-3698; A.S.A. 1947, §§ 43-1420 — 43-255, 256; C. & M. Dig., §§ 2870, 2871, 1423. 2880-2882; Pope's Dig., §§ 3686, 3687,

CASE NOTES

ANALYSIS

Constitutionality.

Purpose.

Felonious intent.

Proof.

Stolen goods received in another state.

Constitutionality.

This section was not abrogated by Ark. Const., Art. 2, § 10. *State v. Johnson*, 38 Ark. 568 (1882).

Purpose.

This section was intended to allow trial in any county where the accused either received the property at first or at any time afterwards had it. *Smith v. State*, 169 Ark. 913, 277 S.W. 530 (1925).

Felonious Intent.

In order to give the circuit court of a county in this state jurisdiction to try one for larceny of property stolen in another

state, it must appear that the property was brought by him into this state, with a continuous felonious intent. *State v. Johnson*, 38 Ark. 568 (1882).

Proof.

It must be proved that defendant stole the property in another state and brought it into this state. *Sullivan v. State*, 109 Ark. 407, 160 S.W. 239 (1913).

Stolen Goods Received in Another State.

This section does not authorize the prosecution in this state of one who merely received stolen goods in another state and brought them into this state. *Wilson v. State*, 97 Ark. 412, 134 S.W. 623 (1911).

Cited: *Elmore v. State*, 45 Ark. 243 (1885); *State v. Alexander*, 118 Ark. 357, 176 S.W. 315 (1915); *Hill v. State*, 253 Ark. 512, 487 S.W.2d 624 (1972).

16-88-114. Jurisdiction of counties — Accessories to felonies.

(a) An indictment against any accessory to any felony may be found in any county where the offense of the accessory may have been committed, notwithstanding the fact that the principal offense may have been committed in another county.

(b) The like proceedings shall be had therein, in all respects, as if the principal offense had been committed in the same county.

History. Rev. Stat., ch. 45, § 97; C. & M. Dig., § 2872; Pope's Dig., § 3688; A.S.A. 1947, § 43-1424.

CASE NOTES

ANALYSIS

Effects of offense.

Instruction.

Effects of Offense.

A crime committed by an accessory must be prosecuted in the county where the consequences of the act occurred.

State v. Reeves, 246 Ark. 1187, 442 S.W.2d 229 (1969).

Instruction.

Instruction held erroneous in not limiting the defendant's acts to those committed in county of the venue. *Green v. State*, 190 Ark. 583, 79 S.W.2d 1006 (1935).

16-88-115. Katie's Law.

(a) This section shall be known and may be cited as "Katie's Law".

(b) When any sexual offense, as defined by § 5-14-101 et seq., is committed against any person who at the time of the sexual offense was traveling within this state by private motor vehicle, common carrier,

watercraft, or other mode of transportation and law enforcement is unable to determine the county in which the sexual offense was committed, the venue for prosecuting the person committing the sexual offense may be in any county of this state from, through, or to which the victim traveled.

History. Acts 2001, No. 582, §§ 1, 2.

Cross References. Sexual Offenses,
§ 5-14-101 et seq.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001
Arkansas General Assembly, Criminal
Law, 24 UALR L.J. 429.

16-88-116. Traffic citations issued within a municipality with a municipal court or a city court — Placement on docket.

(a) All traffic citations issued within the boundaries of a municipality of this state which has a district or city court shall be placed on the docket of the district or city court of that municipality unless the presiding judge of that court authorizes a transfer to another court exercising jurisdiction over the area in which the citation was issued.

(b) If a municipality has more than one (1) court exercising subject matter jurisdiction over traffic citations issued within the boundaries of that municipality, then all traffic citations issued within the boundaries of that municipality shall be placed on the docket of the municipality's district or city court in the closest proximity to where the offense occurred.

History. Acts 2003, No. 1032, § 1.

Cross References. Transition provisions, tenure of present justices and

judges, and jurisdiction of present courts,
Ark. Const. Amend. 80, § 19.

SUBCHAPTER 2 — CHANGE OF VENUE

SECTION.

- 16-88-201. Removal for prejudice.
- 16-88-202. Removal as to several defendants.
- 16-88-203. One change of venue.
- 16-88-204. Application and issuance for order of removal.
- 16-88-205. Recognizance required for certain defendants.
- 16-88-206. Order to remove the bodies of certain defendants.
- 16-88-207. Second removal of same cause prohibited.
- 16-88-208. Notice of order of removal.

SECTION.

- 16-88-209. Transcript of records and proceedings.
- 16-88-210. Attendance of defendant and witnesses required.
- 16-88-211. Entitlement to forfeiture of bail.
- 16-88-212. Costs and expenses of removal.
- 16-88-213. Liability of initial county for costs of trial.
- 16-88-214. Failure of clerk to perform duty.

Cross References. Change of venue, Ark. Const., Art. 2, § 10.

Effective Dates. Acts 1893, No. 65, § 4: effective on passage.

Acts 1899, No. 177, § 2: effective on passage.

RESEARCH REFERENCES

Am. Jur. 21 Am. Jur. 2d, Crim. L., § 372 et seq. **C.J.S.** 22 C.J.S., Crim. L., § 186 et seq.

16-88-201. Removal for prejudice.

Any criminal cause pending in any circuit court may be removed by the order of the court, or by the judge thereof in vacation, to the circuit court of another county whenever it shall appear, in the manner provided in this subchapter, that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair and impartial trial cannot be had in that county.

History. Crim. Code, § 414, as added by Acts 1873, No. 98, § 1, p. 234; C. & M. Dig., § 3087; Pope's Dig., § 3917; A.S.A. 1947, § 43-1501.

CASE NOTES

ANALYSIS

In general.
Burden of proof.
Discretion of court.
Evidence of prejudice.
Insanity.
Knowledge of case.
Question of fact.
Removal denied.

In General.

A change of venue should be granted only when it is clearly shown that a fair trial is not likely to be had in the county; the burden of proof is on the defendant in a motion to change the venue, and the decision of the trial court will be upheld unless it is shown that there was an abuse of discretion in denying the motion. *Berry v. State*, 290 Ark. 223, 718 S.W.2d 447 (1986); *Redding v. State*, 22 Ark. App. 81, 733 S.W.2d 424, rev'd on other grounds, 293 Ark. 411, 738 S.W.2d 410 (1987); *Cash v. State*, 301 Ark. 370, 784 S.W.2d 166 (1990); *McArthur v. State*, 309 Ark. 196, 830 S.W.2d 842 (1992).

Defendant did not have a right to a jury totally ignorant of the crime. *Cash v. State*, 301 Ark. 370, 784 S.W.2d 166 (1990).

Burden of Proof.

The burden is on the defendant to show an inability to obtain a fair trial. *Meny v. State*, 314 Ark. 158, 861 S.W.2d 303 (1993).

Motion for change of venue properly denied where defendant failed to meet his burden of proof that a fair trial was not likely to be had in the county. *Bell v. State*, 324 Ark. 258, 920 S.W.2d 821 (1996).

Discretion of Court.

Unless the trial court abused its discretion in denying motion for a change of venue, it will be affirmed on appeal. *Leggett v. State*, 227 Ark. 393, 299 S.W.2d 59 (1957); *Perry v. State*, 232 Ark. 959, 342 S.W.2d 95 (1961); *Walker v. State*, 241 Ark. 300, 408 S.W.2d 905 (1966), appeal dismissed, 386 U.S. 682, 87 S. Ct. 1325, 18 L. Ed. 2d 403 (1967); *Wood v. State*, 248 Ark. 109, 450 S.W.2d 537 (1970); *Foster v. State*, 275 Ark. 427, 631 S.W.2d 7 (1982); *Redding v. State*, 22 Ark. App. 81, 733 S.W.2d 424, rev'd on other grounds, 293 Ark. 411, 738 S.W.2d 410 (1987); *Cash v. State*, 301 Ark. 370, 784 S.W.2d 166 (1990).

A motion for change of venue is addressed to the sound discretion of the trial

court. *Stout v. State*, 247 Ark. 948, 448 S.W.2d 636 (1970).

A change of venue lies within the discretion of the trial court and if the court determines that the appellant can receive a fair trial by an impartial jury, there is no prejudice regardless of the location of the trial. *Perry v. State*, 277 Ark. 357, 642 S.W.2d 865 (1982).

Trial judge did not err in denying his motion for a change of venue. *Richardson v. State*, 292 Ark. 140, 728 S.W.2d 189 (1987).

Evidence of Prejudice.

Court was held not to have erred in denying change of venue where showing of prejudice was limited to four out of twelve townships in the county. *Cheney v. State*, 205 Ark. 1049, 172 S.W.2d 427 (1943).

In considering a motion for change of venue, it was proper procedure to receive oral testimony to support the position of either the defendant or the state. *Wood v. State*, 248 Ark. 109, 450 S.W.2d 537 (1970).

A change of venue should be granted only when it is clearly shown that a fair trial is likely not to be had in the county. *Kirkendall v. State*, 265 Ark. 853, 581 S.W.2d 341 (1979).

Evidence insufficient to show that the minds of the inhabitants of the county in which the cause was pending were so prejudiced against the defendant that a fair and impartial trial could not be had therein. *Wright v. State*, 267 Ark. 264, 590 S.W.2d 15 (1979); *O'Rourke v. State*, 295 Ark. 57, 746 S.W.2d 52 (1988).

Where in a prosecution for capital felony murder and other crimes, the trial judge specifically found that none of the defendant's witnesses showed that they were cognizant of prejudice existing throughout the whole county, but merely portions of the county, the trial judge did not abuse his discretion in refusing to grant the defendant's motion for a change of venue. *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, cert. denied, 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982).

A movant in a change of venue proceeding must demonstrate that there is countywide prejudice against him before his motion for a change of venue will be granted. *Foster v. State*, 275 Ark. 427, 631 S.W.2d 7 (1982); *Berry v. State*, 290 Ark. 223, 718 S.W.2d 447 (1986); *Redding v.*

State, 22 Ark. App. 81, 733 S.W.2d 424, rev'd on other grounds, 293 Ark. 411, 738 S.W.2d 410 (1987).

Where there was ample testimony by the defendant's witnesses at a change of venue hearing from which the trial judge could conclude that the witnesses had no personal knowledge of prejudice that existed throughout the county, the trial judge did not abuse his discretion when he denied the defendant's motion for a change of venue. *Foster v. State*, 275 Ark. 427, 631 S.W.2d 7 (1982).

There can be no error in the denial of a change of venue if an examination of the jury selection shows that an impartial jury was selected and that each juror stated that he could give the defendant a fair trial and follow the instructions of the court. *Berry v. State*, 290 Ark. 223, 718 S.W.2d 447 (1986); *Redding v. State*, 22 Ark. App. 81, 733 S.W.2d 424, rev'd on other grounds, 293 Ark. 411, 738 S.W.2d 410 (1987); *O'Rourke v. State*, 295 Ark. 57, 746 S.W.2d 52 (1988); *McArthur v. State*, 309 Ark. 196, 830 S.W.2d 842 (1992).

Where voir dire of jurors showed that some had heard of the case or read about it, but none of those selected said they could not give the defendant a fair trial and the record revealed that, in the six months before trial took place, there was no extraordinary media coverage or local gossip about the crime, defendant was tried by a fair and impartial jury. *Cash v. State*, 301 Ark. 370, 784 S.W.2d 166 (1990).

The burden is on the defendant to show the general mindset of the populace and the concomitant impossibility of receiving a fair trial, and where defendant did not exercise all of his peremptory challenges of jurors chosen trial court did not abuse its discretion in refusing to remove the case. *Morris v. State*, 302 Ark. 532, 792 S.W.2d 288 (1990).

Witnesses on a change of venue motion must demonstrate countywide knowledge of prejudice or the county's state of mind. *McArthur v. State*, 309 Ark. 196, 830 S.W.2d 842 (1992).

Affidavits that cite little or nothing beyond an affiant's own convictions that a fair trial is not possible are insufficient. *Noel v. State*, 331 Ark. 79, 960 S.W.2d 439 (1998).

Insanity.

When the question of insanity is sub-

mitted to a jury on writ of error coram nobis, after conviction and sentence, the prisoner is entitled to a change of venue upon such issue, but the change of venue carries with it the whole case. *Adler v. State*, 35 Ark. 517 (1880); *Dewein v. State*, 120 Ark. 302, 179 S.W. 346 (1915).

Where determination of sanity is the issue, widespread belief in minds of inhabitants of county that accused was the person who robbed and killed a certain man would not show a prejudice that would prevent a fair and impartial trial. *Dewein v. State*, 120 Ark. 302, 179 S.W. 346 (1915).

Knowledge of Case.

It is not necessary that jurors be totally ignorant of the facts surrounding the case, as long as they can set aside any impression they have formed and render a verdict solely on the evidence at trial. *McArthur v. State*, 309 Ark. 196, 830 S.W.2d 842 (1992).

Question of Fact.

Petitioner's anticipation of difficulties in obtaining a fair and impartial trial because of inflamed public sentiment is a question of fact to be determined by the trial court having jurisdiction to try the offense with which she is charged, and thus is not a ground for removal from the state court; if the constitutional rights of petitioner are being denied or invaded by the court, appellate jurisdiction can and will correct the wrong. *Rand v. Arkansas*,

191 F. Supp. 20 (W.D. Ark. 1961); *Davis v. Reed*, 316 Ark. 575, 873 S.W.2d 524 (1994).

Removal Denied.

Defendant's change-of-venue motion alleging adverse pretrial publicity was properly denied in light of the testimony introduced at the hearing which showed less-than-pervasive publicity, the failure of defendant to demonstrate during voir dire that there were publicity-affected jurors, and the fact that he did not use all his peremptory challenges. *Rankin v. State*, 329 Ark. 379, 948 S.W.2d 397 (1997).

Change-of-venue motion properly denied where an examination of the jury selection showed that an impartial jury was selected; all of the jurors pledged that they could decide the case based solely on the evidence. *Noel v. State*, 331 Ark. 79, 960 S.W.2d 439 (1998).

In a criminal prosecution for capital murder, defendant was not entitled to a change of venue on the basis of pretrial publicity where the jury members were questioned on the change-of-venue point and the circuit court properly concluded that the jurors were impartial. *Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004).

Cited: *Bussard v. State*, 300 Ark. 174, 778 S.W.2d 213 (1989); *Davis v. Reed*, 316 Ark. 575, 873 S.W.2d 524 (1994); *Taylor v. State*, 334 Ark. 339, 974 S.W.2d 454 (1998).

16-88-202. Removal as to several defendants.

When there are several defendants in any indictment or criminal prosecution and the cause of the removal of the defendants exists only as to one (1) or more of them, the other defendants shall be tried and all proceedings had against them in the county in which the case is pending, in all respects as if no order of removal had been made as to any defendant.

History. *Crim. Code*, § 431, as added by Acts 1873, No. 98, § 1, p. 234; *C. & M. Dig.*, § 3107; *Pope's Dig.*, § 3937; *A.S.A.* 1947, § 43-1517.

16-88-203. One change of venue.

Only one (1) change of venue shall be granted in any criminal case or prosecution.

History. *Crim. Code*, § 433, as added by Acts 1873, No. 98, § 1, p. 234; *C. & M. Dig.*, § 3108; *Pope's Dig.*, § 3938; *A.S.A.* 1947, § 43-1518.

CASE NOTES

ANALYSIS

Constitutionality.
Denial of second change.
Retrial.

Constitutionality.

This section is not unconstitutional on its face. *Swindler v. State*, 267 Ark. 418, 592 S.W.2d 91 (1979), cert. denied, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1980).

Denial of Second Change.

Where an examination of the record in a murder prosecution revealed that each of the jurors stated they could give the appellant a fair trial and that they would be guided by the instructions of the trial court, the trial court did not abuse its discretion when it refused to grant the defendant's request for a second change of venue. *Perry v. State*, 277 Ark. 357, 642 S.W.2d 865 (1982).

The trial court complied with Ark. Const., Art. 2, § 10, and this section when it acted upon the defendant's first request for a change of venue and transferred venue to another county; although the defendant labeled his second motion as a motion to withdraw the earlier request for a change of venue, it was actually nothing more than a request for a second change of venue and therefore, was discretionary with the trial judge. *Dansby v. State*, 338 Ark. 697, 1 S.W.3d 403 (1999).

Retrial.

On retrial for capital murder, the defendant was not entitled to a change of venue where he had previously been granted a change, notwithstanding that a federal court vacated the state judgment of conviction. *Ford v. Wilson*, 327 Ark. 243, 939 S.W.2d 258 (1997).

Cited: *Perry v. State*, 279 Ark. 213, 650 S.W.2d 240 (1983); *Ronning v. State*, 295 Ark. 228, 748 S.W.2d 633 (1988).

16-88-204. Application and issuance for order of removal.

(a)(1) The application of the defendant for an order of removal shall be by petition setting forth the facts on account of which the removal is requested. The truth of the allegations in the petition shall be supported by the affidavits of two (2) credible persons who are qualified electors, actual residents of the county, and not related to the defendant in any way.

(2) Reasonable notice of the application shall be given to the prosecuting attorney.

(3) The court shall hear the application and, after considering the facts set forth in the petition and the affidavits accompanying it and any other affidavits or counter affidavits that may be filed and, after hearing any witnesses produced by either party, shall either grant or refuse the petition according to the truth of the facts alleged in it and established by the evidence.

(b) Every order for the removal of a criminal cause under the provisions of this subchapter shall state whether the order is made on the application of the party or on facts within the knowledge of the court or judge making the order, and shall specify the cause of removal, and designate the county to which the cause is to be removed.

(c) The order, if made in term time, shall be entered on the record of the proceedings of the court. If made by a judge in vacation, the order shall be in writing and be signed by the judge and shall be filed by the clerk with the petition, if any, as a part of the record.

History. Crim. Code, §§ 415, 417, 418, as added by Acts 1873, No. 98, § 1, p. 156; 1873, No. 98, § 1, p. 234; C. & M. Dig., §§ 3088-3090; Init. Meas. 1936, No. 3,

§ 27, Acts 1937, p. 1384; Pope's Dig., §§ 3918-3920; A.S.A. 1947, §§ 43-1502 — 43-1504.

CASE NOTES

ANALYSIS

In general.

Affidavits.

—Basis of opinion.

—Credibility of affiants.

Burden of proof.

County with two districts.

Discretion of court.

Evidence.

—Sufficiency.

—Witnesses.

Form.

Ineffective counsel.

Motion to annul order.

Notice.

Presence of defendant.

Presumption.

Sufficiency of application.

Waiver.

In General.

A change of venue should be granted only when it is clearly shown that a fair trial is not likely to be had in the county; the burden of proof is on the defendant in a motion to change the venue, and the decision of the trial court will be upheld unless it is shown there was an abuse of discretion in denying the motion. *Berry v. State*, 290 Ark. 223, 718 S.W.2d 447 (1986).

Affidavits.

Transfer may be allowed where public sentiment is so strong that affidavits cannot be obtained. *Hildreth v. State*, 214 Ark. 710, 217 S.W.2d 622 (1949).

The language requiring affidavits by two persons is mandatory, as evidenced by use of the word "shall." *Singleton v. State*, 337 Ark. 503, 989 S.W.2d 533 (1999).

—Basis of Opinion.

A change on the ground of prejudice will be refused where the examination of the affiants discloses the fact that their information or means of knowledge is insufficient. *Duckworth v. State*, 80 Ark. 360, 97 S.W. 280 (1906); *White v. State*, 83 Ark. 36, 102 S.W. 715 (1907); *Duckworth v. State*, 86 Ark. 357, 111 S.W. 268 (1908);

William v. State, 103 Ark. 70, 146 S.W. 471 (1912); *Wolfe v. State*, 107 Ark. 29, 153 S.W. 1100 (1913).

Affiants' opinions held based on insufficient information to warrant change of venue. *Jordan v. State*, 141 Ark. 504, 217 S.W. 788 (1920); *Davis v. State*, 155 Ark. 245, 244 S.W. 750 (1922); *Mullen v. State*, 193 Ark. 648, 102 S.W.2d 82 (1937); *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, cert. denied, 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982); *Foster v. State*, 275 Ark. 427, 631 S.W.2d 7 (1982).

Affiants' opinions held based on sufficient information to warrant change of venue. *Sisson v. State*, 168 Ark. 783, 272 S.W. 674 (1925).

This section contemplates that the subscribing witnesses shall have fairly accurate information concerning the state of mind of the inhabitants of the entire county toward the defendant. *Bailey v. State*, 204 Ark. 376, 163 S.W.2d 141 (1942); *Cheney v. State*, 205 Ark. 1049, 172 S.W.2d 427 (1943); *Fancher v. State*, 205 Ark. 1085, 172 S.W.2d 680 (1943).

—Credibility of Affiants.

The prosecuting attorney may introduce counter affidavits to show that the person making affidavit in support of the application is not a credible person. *Curtis v. State*, 36 Ark. 284 (1880).

Affiant may be examined orally in open court in order to ascertain his credibility. *Jackson v. State*, 54 Ark. 243, 15 S.W. 607 (1891); *Spurgeon v. State*, 160 Ark. 112, 254 S.W. 376 (1923).

Court could not determine that attesting witnesses were not credible witnesses on ground that it knew facts stated in affidavit were not true where it refused to call such witnesses for examination. *Ward v. State*, 68 Ark. 466, 60 S.W. 31 (1900).

While the credibility of the affiants may be investigated, the truth or falsity of their affidavits cannot be inquired into. *Strong v. State*, 85 Ark. 536, 109 S.W. 536 (1908); *Kendrick v. State*, 180 Ark. 1160, 24 S.W.2d 859 (1930).

Affiants held not to be credible persons.

Brown v. State, 134 Ark. 597, 203 S.W. 1031 (1918).

It was the duty of the defendant to produce the affiants so that the state could test their credibility by oral examination to determine their means of knowledge concerning the facts about which they made affidavits. *Spurgeon v. State*, 160 Ark. 112, 254 S.W. 376 (1923).

Court was authorized to inquire, not only as to whether the affiants had sworn or were likely to swear falsely, but into their motives, intent and feelings and their opportunities and means of knowledge as to existing prejudice, in order that the court might determine whether they were credible persons within this section. *Clark v. State*, 169 Ark. 717, 276 S.W. 849 (1925).

Affiants held to be credible persons. *Padgett v. State*, 171 Ark. 556, 286 S.W. 819 (1926).

In passing upon applications for change of venue in criminal cases, the court's discretion is limited to passage upon the credibility of the affiants, and in doing so the court may orally examine the affiants as to their informations to determine whether they have sworn recklessly or falsely without sufficient information as to the state of mind of the inhabitants of the county. *Kendrick v. State*, 180 Ark. 1160, 24 S.W.2d 859 (1930).

One who swears recklessly or who is generally known to be wanting in reputation for truth and veracity is not credible. *Fancher v. State*, 205 Ark. 1085, 172 S.W.2d 680 (1943).

Burden of Proof.

The burden is on the applicant for a change of venue to make credible proof to support his motion. *Maxwell v. State*, 236 Ark. 694, 370 S.W.2d 113 (1963); *DuBois v. State*, 258 Ark. 459, 527 S.W.2d 595 (1975).

A movant in a change of venue proceeding must demonstrate that there is countywide prejudice against him before his motion for a change of venue will be granted. *Foster v. State*, 275 Ark. 427, 631 S.W.2d 7 (1982); *Berry v. State*, 290 Ark. 223, 718 S.W.2d 447 (1986).

County with Two Districts.

Petition filed in one district of a county, asking for a change of venue from both districts of that county to a second county,

should have been granted and it was error to merely change venue to the other district of the first county. *Williams v. State*, 160 Ark. 587, 255 S.W. 314 (1923).

Discretion of Court.

Denial of a motion for a change of venue is within the discretion of the trial judge and his order is conclusive on appeal in the absence of an abuse of that discretion. *Speer v. State*, 130 Ark. 457, 198 S.W. 113 (1917); *Adams v. State*, 179 Ark. 1047, 20 S.W.2d 130 (1929); *Meyer v. State*, 218 Ark. 440, 236 S.W.2d 996 (1951); *Foster v. State*, 275 Ark. 427, 631 S.W.2d 7 (1982).

Court has broad discretion in determining credibility of affiants, and this discretion should not be disturbed except for compelling reasons. *Ragsdale v. State*, 132 Ark. 210, 200 S.W. 802 (1918); *Mullen v. State*, 193 Ark. 648, 102 S.W.2d 82 (1937); *Bailey v. State*, 204 Ark. 376, 163 S.W.2d 141 (1942).

Evidence.

Trial court cannot rely on its own knowledge of local condition in passing upon petition for change of venue due to hostile public sentiment, but it must hear evidence upon the same and make its decision upon the evidence submitted. *Ward v. State*, 68 Ark. 466, 60 S.W. 31 (1900); *Hildreth v. State*, 214 Ark. 710, 217 S.W.2d 622 (1949).

Where attorneys for defendant presented a petition to the trial court in which they asked for a change of venue due to hostile public opinion, swore on oath that affidavits could not be obtained from residents of the community due to fear of reprisal from the other residents of the community, and agreed to testify to this condition, trial court erred in refusing to consider petition and to listen to their evidence. *Hildreth v. State*, 214 Ark. 710, 217 S.W.2d 622 (1949).

—Sufficiency.

Evidence held insufficient to support change of venue. *Meyer v. State*, 218 Ark. 440, 236 S.W.2d 996 (1951); *Leggett v. State*, 227 Ark. 393, 299 S.W.2d 59 (1957); *Moore v. State*, 227 Ark. 544, 299 S.W.2d 838 (1957); *Maxwell v. State*, 236 Ark. 694, 370 S.W.2d 113 (1963); *Trotter v. State*, 237 Ark. 820, 377 S.W.2d 14, cert. denied, 379 U.S. 890, 85 S. Ct. 163, 13 L. Ed. 2d 94 (1964); *Bailey v. State*, 238 Ark. 210, 381 S.W.2d 467 (1964); *Stout v. State*,

247 Ark. 948, 448 S.W.2d 636 (1970); *Blanton v. State*, 249 Ark. 181, 458 S.W.2d 373 (1970), cert. denied, 401 U.S. 1003, 91 S. Ct. 1240, 28 L. Ed. 2d 539 (1971); *Scott v. State*, 249 Ark. 967, 463 S.W.2d 404 (1971); *Swindler v. State*, 267 Ark. 418, 592 S.W.2d 91 (1979), cert. denied, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1980).

Evidence sufficient to warrant change of venue. *Rush v. State*, 238 Ark. 149, 379 S.W.2d 29 (1964).

A motion for change of venue is not supported by "credible persons" when the movants, affiants, or witnesses are unable to show in their testimony that they have general knowledge as to the state of mind of the inhabitants of the whole county or that they are cognizant of prejudice existing throughout the whole county. *Berry v. State*, 290 Ark. 223, 718 S.W.2d 447 (1986).

The trial court did not abuse its discretion in not granting the change of venue based on two affidavits, where the state was able to show by cross-examination to the satisfaction of the trial court that the affiants for the defendant were not credible because they did not possess knowledge of the state of mind of the inhabitants of the entire county, and all the jurors selected either had heard nothing regarding the case or said they could set aside anything they had heard and decide the case on the evidence. *Berry v. State*, 290 Ark. 223, 718 S.W.2d 447 (1986).

There can be no error in the denial of a change of venue if an examination of the jury selection shows that an impartial jury was selected and that each juror stated that he could give the defendant a fair trial and follow the instructions of the court. *Berry v. State*, 290 Ark. 223, 718 S.W.2d 447 (1986).

Although voir dire reflected that publicity concerning the case was considerable, the record of the voir dire did not reveal such hostility towards the defendant by jurors who served in his trial as to suggest a partiality that could not be laid aside. *Swindler v. Lockhart*, 885 F.2d 1342 (8th Cir. 1989), cert. denied, 495 U.S. 911, 110 S. Ct. 1938, 109 L. Ed. 2d 301 (1990).

Defendant's change-of-venue motion alleging adverse pretrial publicity was properly denied in light of the testimony introduced at the hearing which showed less-than-pervasive publicity, the failure of

defendant to demonstrate during voir dire that there were publicity-affected jurors, and the fact that he did not use all his peremptory challenges. *Rankin v. State*, 329 Ark. 379, 948 S.W.2d 397 (1997).

—Witnesses.

Court had a right to consider not only the counter affidavit, but to hear the witnesses offered. *Bailey v. State*, 204 Ark. 376, 163 S.W.2d 141 (1942).

Witnesses may be heard to assist the court in determining whether allegations contained in the affidavit are true. *Fancher v. State*, 205 Ark. 1085, 172 S.W.2d 680 (1943).

Court may hear testimony on the question of credibility, but it should not permit witnesses to be called for the purpose of giving independent testimony that a fair trial may be had and that prejudice does not exist, nor may the court substitute its own information or beliefs for those of the affiant when such information is dehors the record. *Fancher v. State*, 205 Ark. 1085, 172 S.W.2d 680 (1943).

Failure to produce any of the affiants or to assign any reason for such failure is proper ground for refusal of the petition. *Morton v. State*, 208 Ark. 492, 187 S.W.2d 335 (1945).

Where a petition for a change of venue is filed in a criminal case, and supporting affidavits accompany the petition, the court may summon and examine the affiants. *Robertson v. State*, 212 Ark. 301, 206 S.W.2d 748 (1947).

It is not necessary for state affiants to appear in court although trial court may require their presence. *DuBois v. State*, 258 Ark. 459, 527 S.W.2d 595 (1975).

Form.

An order changing the venue in a criminal cause need not set forth the ground thereof, the same appearing in the petition which is a part of the record. *Dixon v. State*, 29 Ark. 165 (1874).

Where venue was changed, defendant could not complain of want of jurisdiction of such court on ground that his affidavit for change of venue was not signed by clerk. *Bittick v. State*, 67 Ark. 131, 53 S.W. 571 (1899).

Error in reference to circuit court to which case was transferred was only a clerical error which could result in no prejudice to the defendant. *Ragsdale v. State*, 132 Ark. 210, 200 S.W. 802 (1918).

Ineffective Counsel.

Where petitioner asserted that his counsel was ineffective because he failed to follow statutory procedures when moving for a change of venue, but the motions were all decided on the merits, as if they had been properly submitted, the court did not find that the counsel's failure was an error so serious as to amount to constitutionally deficient performance. *Swindler v. Lockhart*, 693 F. Supp. 760 (E.D. Ark. 1988), *aff'd*, 885 F.2d 1342 (8th Cir. 1989), *cert. denied*, 495 U.S. 911, 110 S. Ct. 1938, 109 L. Ed. 2d 301 (1990).

Motion to Annul Order.

Where defendant who had been granted a change of venue moved to annul the order, but furnished no supporting affidavits that the minds of the inhabitants of the county to which the change had been made were prejudiced, the motion was properly denied. *Watson v. State*, 177 Ark. 708, 7 S.W.2d 980 (1928).

Notice.

Court may not arbitrarily make a rule requiring three day's notice to the attorney for the state of the intention to ask for a change of venue. *Maxey v. State*, 76 Ark. 276, 88 S.W. 1009 (1905).

Presence of Defendant.

Defendant should be present when the order is made, but his absence is not reversible error. *Polk v. State*, 45 Ark. 165 (1885); *Bolling v. State*, 54 Ark. 588, 16 S.W. 658 (1891).

Presumption.

Where local prejudice rendering impossible an impartial trial is made cause for change of venue, legal presumption is that defendant can get a fair and impartial trial in the county in which the offense was committed, and to overcome this presumption defendant must show clearly that this cannot be done, and before a court is justified in sustaining an application on account of the prejudice of the inhabitants of the county, it must affirmatively appear that there is such a feeling of prejudice prevailing in the community as will be reasonably certain to prevent a fair and impartial trial. *Bailey v. State*, 204 Ark. 376, 163 S.W.2d 141 (1942).

Sufficiency of Application.

Motion for a change of venue alleging that the minds of the inhabitants in the

county in which the cause is pending are so prejudiced against the defendant that a fair and impartial trial cannot be had therein, verified by the defendant's affidavit, is a sufficient "petition" within the meaning of this section. *Jackson v. State*, 54 Ark. 243, 15 S.W. 607 (1891).

Motion for change of venue was properly overruled where it contained the supporting affidavit of only one person. *Davis v. State*, 170 Ark. 602, 280 S.W. 636 (1926); *Gaines v. State*, 208 Ark. 293, 186 S.W.2d 154 (1945).

Application for a change of venue was held properly denied where the supporting affidavit did not state that the affiants were not related to the defendant. *Crow v. State*, 190 Ark. 222, 79 S.W.2d 75 (1935).

Petition for change of venue not supported by affidavits of two qualified electors of the county is not sufficient, and more especially so when testimony permitted by lower court after overruling the petition did not support the petitioner's contention. *Chitwood v. State*, 210 Ark. 367, 196 S.W.2d 241 (1946).

Where no affidavits had been filed in support of petition, there was no evidence that the minds of the inhabitants of the county were so prejudiced against the defendant that a fair and impartial trial could not be had therein. *Wright v. State*, 267 Ark. 264, 590 S.W.2d 15 (1979).

Affidavits or sworn testimony must be offered to support a motion for a change of venue. *Swindler v. State*, 267 Ark. 418, 592 S.W.2d 91 (1979), *cert. denied*, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1980).

Where the defendant failed to attach affidavits to his motion for a change of venue, there was no evidence that the jurors were prejudiced by the pretrial publicity, and the motion was properly denied. *Stone v. State*, 290 Ark. 204, 718 S.W.2d 102 (1986).

Waiver.

While it was error to overrule an application for a change of venue which complied with the statutory requirements, the error was waived by the defendant by subsequently entering a plea of guilty. *Hudspeth v. State*, 188 Ark. 323, 67 S.W.2d 191 (1933), *cert. denied*, 296 U.S. 642, 56 S. Ct. 178, 80 L. Ed. 456 (1935).

Cited: *White v. State*, 83 Ark. 36, 102 S.W. 715 (1907); *Jordan v. State*, 141 Ark.

504, 217 S.W. 788 (1920); *Cain v. State*, Ark. 440, 236 S.W.2d 996 (1951); *Bussard v. State*, 300 Ark. 174, 778 S.W.2d 213 (1989); *Sanders v. State*, 317 Ark. 328, 878 S.W.2d 427 (1943); *Meyer v. State*, 218 S.W.2d 391 (1994).

16-88-205. Recognizance required for certain defendants.

(a) When the order is made, the defendant, if not in custody and the offense charge is bailable, shall enter into recognizance with sufficient security for his or her appearance to answer the charges in the court to which the cause is to be removed, on the first day of the next term thereof, and not depart the court without leave.

(b) The recognizance may be taken by the court or judge making the order of removal or by any officer authorized by law to let to bail after indictment is found.

(c) When the recognizance is taken out of the court in which the cause is pending, it shall be filed with the clerk of the court as a part of the record in the cause.

(d) No order for the removal of a cause shall be effectual in the case of any defendant not in confinement or custody unless a recognizance is entered into as directed in this subchapter or unless the order of the removal is delivered before any juror is sworn in the cause.

History. Crim. Code, §§ 419-421, as added by Acts 1873, No. 98, § 1, p. 234; C. & M. Dig., §§ 3091-3903; Pope's Dig., §§ 3921-3923; A.S.A. 1947, §§ 43-1505 — 43-1507.

CASE NOTES

Construction.

This section is merely directory. *Beasley v. State*, 53 Ark. 67, 13 S.W. 733 (1890); *Havis v. State*, 62 Ark. 500, 37 S.W. 957 (1896); *Minor v. State*, 162 Ark. 136, 258 S.W. 121 (1924). **Cited:** *Perry v. State*, 279 Ark. 213, 650 S.W.2d 240 (1983).

16-88-206. Order to remove the bodies of certain defendants.

(a) If the defendant is in actual custody, the court or judge granting the order of removal shall also make an order commanding the sheriff to remove the body of the defendant to the jail of the county into which the cause is to be removed and deliver the defendant to the keeper of the jail, together with the warrant or process by virtue of which he or she is imprisoned and held.

(b) The sheriff shall obey the order without unnecessary delay and shall endorse on the commitment process or order of the court by which the prisoner is held in his or her custody the reason of the change of custody. The sheriff shall deliver the warrant with the prisoner to the keeper of the jail of the proper county, who shall give the sheriff a receipt therefor, and take charge of and keep the prisoner in the same manner as if he or she had been originally committed to the jail.

History. Crim. Code, §§ 422, 423, as added by Acts 1873, No. 98, § 1, p. 234; C. & M. Dig., §§ 3094, 3095; Pope's Dig., §§ 3924, 3925; A.S.A. 1947, §§ 43-1508, 43-1509.

16-88-207. Second removal of same cause prohibited.

In no case shall a second removal of the same cause be allowed.

History. Crim. Code, § 421, as added by Acts 1873, No. 98, § 1, p. 234; C. & M. Dig., § 3093; Pope's Dig., § 3923; A.S.A. 1947, § 43-1507.

CASE NOTES

ANALYSIS

Constitutionality.
No error.

Constitutionality.

This section is not on its face unconstitutional. *Swindler v. State*, 267 Ark. 418, 592 S.W.2d 91 (1979), cert. denied, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1980).

This section, which purports to limit a criminal defendant to one change of venue, is not unconstitutional on its face. As with Ark. Const., Art. 2, § 8, this section can, and must, be read as operative only within the bounds of the sixth and fourteenth amendments to the United States Constitution. *Swindler v. Lockhart*, 693 F. Supp. 760 (E.D. Ark. 1988), aff'd, 885 F.2d 1342 (8th Cir. 1989), cert. denied, 495 U.S. 911, 110 S. Ct. 1938, 109 L. Ed. 2d 301 (1990).

No Error.

Even if the trial judge erroneously be-

lieved that this section prevented absolutely a second change of venue, the court expressed a willingness to consider the constitutional implications of the statute if necessary to preserve the defendant's right to a fair trial; and the trial court gave alternative reasoning for denying the change of venue and did not base his decision solely on the belief that he lacked the authority to grant the change. Even if there were error, there was no actual prejudice, since the seated jury was composed of those who either had virtually no knowledge of the case, or who had tentative opinions which could be set aside; accordingly, the appellate court found no manifest error in the decision of the trial court not to permit a second change of venue. *Swindler v. Lockhart*, 693 F. Supp. 760 (E.D. Ark. 1988), aff'd, 885 F.2d 1342 (8th Cir. 1989), cert. denied, 495 U.S. 911, 110 S. Ct. 1938, 109 L. Ed. 2d 301 (1990).

Cited: *Perry v. State*, 279 Ark. 213, 650 S.W.2d 240 (1983); *Swindler v. Lockhart*, 885 F.2d 1342 (8th Cir. 1989).

16-88-208. Notice of order of removal.

(a) When the order of removal is made in term time, it shall be deemed a notice to every person who has entered into recognizance to appear at the term.

(b) In all other cases, the notice shall be given in writing, signed by the prosecuting attorney or the clerk of the court, and be served on the person so recognized in the manner provided by law for serving other notices.

History. Crim. Code, § 428, as added by Acts 1873, No. 98, § 1, p. 234; C. & M. Dig., § 3100; Pope's Dig., § 3930; A.S.A. 1947, § 43-1514.

16-88-209. Transcript of records and proceedings.

(a) Whenever any order shall be made for the removal of any cause under the provisions of this subchapter, the clerk of the court in which

the cause is pending shall make out a full transcript of the records and proceedings in the cause, including the order of removal, the petition therefor, if any, and the recognizance of the defendant and of all witnesses. The clerk shall immediately transmit the transcript, duly certified under the seal of the court, to the clerk of the court to which the removal of the cause is ordered.

(b) If the transcript shall not have been transmitted or shall not have been received on or before the first term of the court to which the cause is ordered removed, or if the transcript shall be lost or destroyed, the cause shall not, by reason thereof, abate or be discontinued, but the transcript, or another in lieu thereof, may be transmitted and filed as required by this subchapter at or before the next succeeding term of the court. Proceeding shall be had thereon as if no failure or loss had happened.

(c) On the receipt of the transcript by the clerk of the court to which any cause is removed, the clerk shall file the transcript as a record of his court, and the same proceedings shall be had in the cause in the court, and in the same manner in all respects, as if the cause had originated there.

History. Crim. Code, §§ 424-426, as added by Acts 1873, No. 98, § 1, p. 234; C. & M. Dig., §§ 3096-3098; Pope's Dig., §§ 3926-3928; A.S.A. 1947, §§ 43-1510 — 43-1512.

CASE NOTES

ANALYSIS

Certification.
Perfection by certiorari.
Signature of clerk.
Transfer of records.

Certification.

Transcript should be duly certified by the clerk under the seal of his court, and the omission of the seal cannot be corrected by the clerk's attaching his official seal to the certificate, by leave of the court, after trial and judgment. *Hudley v. State*, 36 Ark. 237 (1880).

No legal conviction can be had upon an uncertified transcript. *Ball v. State*, 48 Ark. 94, 2 S.W. 462 (1886).

Perfection by Certiorari.

Where, after change of venue and verdict against the prisoner, a motion in arrest of judgment is made on ground the transcript does not show all necessary steps in proceeding, the transcript may be perfected by certiorari. *Green v. State*, 19 Ark. 178 (1857); *Binns v. State*, 35 Ark. 118 (1879).

Signature of Clerk.

Presumption in favor of the regularity of a transcript on a change of venue which is properly certified over the seal of the court, with the clerk's name affixed, is not overcome by proof that the clerk's signature is not in his handwriting, as he may have adopted another's writing for his signature. *Harwood v. State*, 63 Ark. 130, 37 S.W. 304 (1896).

Transfer of Records.

Original indictment remains in the court where it is preferred. *Pleasant v. State*, 15 Ark. 624 (1855).

Until the transcript is lodged in the court to which the venue is changed, such court has no jurisdiction to try the cause. *Burris v. State*, 38 Ark. 221 (1881).

Defendant cannot complain because the original indictment and application for change of venue were transmitted instead of certified copies. *Kelly v. State*, 102 Ark. 651, 145 S.W. 556 (1912).

Cited: *Davis v. Reed*, 316 Ark. 575, 873 S.W.2d 524 (1994).

16-88-210. Attendance of defendant and witnesses required.

The defendant and all witnesses, and others who shall have entered into recognizance to attend the trial of any cause, having notice of the removal thereof, shall be bound to attend at the time and place of trial in the county to which the cause is so removed. A failure to do so shall be deemed a breach of the recognizance. Upon motion of the prosecuting attorney, judgment of forfeiture shall be entered by the court as provided by law.

History. Crim. Code, § 427, as added Dig., § 3099; Pope's Dig., § 3929; A.S.A. by Acts 1873, No. 98, § 1, p. 234; C. & M. 1947, § 43-1513.

16-88-211. Entitlement to forfeiture of bail.

When any person shall be indicted in any county in this state and an order shall be made for a change of venue to any other county in this state, and the defendant has been admitted to bail and a forfeiture has been taken upon the bond and judgment rendered thereon by the court of the county in which the cause stands for trial, the judgment when collected shall be paid by the sheriff into the treasury of the county in which the indictment was found.

History. Acts 1899, No. 177, § 1, p. 314; C. & M. Dig., § 3105; Pope's Dig., § 3935; A.S.A. 1947, § 43-1522. **Cross References.** Bail generally, § 16-84-101 et seq.

16-88-212. Costs and expenses of removal.

The costs and expenses necessarily incurred in the removal of any cause under the provisions of this subchapter shall be adjusted and allowed by the court where the cause is tried and shall be taxed and collected as other costs in the cause.

History. Crim. Code, § 429, as added Dig., § 3101; Pope's Dig., § 3931; A.S.A. by Acts 1873, No. 98, § 1, p. 234; C. & M. 1947, § 43-1515.

16-88-213. Liability of initial county for costs of trial.

(a) Whenever a change of venue is taken in any cause from one county to another as provided by law, the county from which the change of venue is taken shall be liable for all costs for which counties are liable under existing laws, and the county to which the change of venue is taken and where the cause is tried shall not be liable for any cost.

(b)(1) It shall be the duty of the clerk of the court trying any cause, immediately after the trial of the cause, to make out a statement of all costs accrued in the cause and for which counties are liable under existing laws.

(2) The statement of costs, if correct, shall be so certified by the judge of the court trying the cause. The clerk shall thereupon transmit the statement to the county clerk of the county in which the case originated,

and the costs shall be allowed and paid by the county to the party entitled to the costs.

(c)(1) The court trying any cause or causes on change of venue shall also enter an order on the record of the court at the close of the term of the court allowing the county in which the cause or causes have been tried the amount of per diem of the trial jury engaged in the trial in any or all of the causes and sheriffs during the trials. It shall be the duty of the court in making the order to take into consideration parts of a day.

(2) A copy of the order certified by the court shall be certified to the county clerk of the county where the cause or causes originated, and it shall be allowed and paid to the county trying the cause or causes by the county where the cause or causes originated.

History. Acts 1893, No. 65, §§ 1-3, p. Dig., §§ 3932-3934; A.S.A. 1947, §§ 43-100; C. & M. Dig., §§ 3102-3104; Pope's 1519 — 43-1521.

CASE NOTES

ANALYSIS

Extent of liability.

Fines and fees.

Judge's certificate.

Extent of Liability.

County in which the case originated is liable for all of the current expenses incurred in another county, in the trial of the cause, as well as for the costs for which it was already liable. *Hempstead County v. Royston*, 58 Ark. 113, 23 S.W. 650 (1893).

Fines and Fees.

Where there is a change of venue, fines

and fees belong to the county where the offense was committed and the indictment found, even though the trial is held in the county to which the cause is removed. *Washington County v. Benton County*, 43 Ark. 267 (1884); *Russell v. Rowland*, 47 Ark. 203, 1 S.W. 74 (1886).

Judge's Certificate.

Certificate of judge is not a judicial act, but the court has power to correct the certificate and retax the costs. *Peay v. Searcy County*, 104 Ark. 133, 148 S.W. 500 (1912).

16-88-214. Failure of clerk to perform duty.

If any clerk of the circuit court shall neglect or refuse to perform any duty in relation to the removal of a cause enjoined on him or her by the provisions of §§ 16-88-201 — 16-88-210, 16-88-212, and 16-88-214, he or she shall forfeit and pay any sum not exceeding five hundred dollars (\$500), to be recovered by civil action in the name of the state.

History. Crim. Code, § 430, as added by Acts 1873, No. 98, § 1, p. 234; C. & M. Dig., § 3106; Pope's Dig., § 3936; A.S.A. 1947, § 43-1516.

CHAPTER 89

TRIAL AND VERDICT

SECTION.

16-89-101. Trial times and postpone-
ments.

16-89-102. Severance.

SECTION.

16-89-103. Presence of defendant.

16-89-104. Interpreters in criminal ac-
tions generally.

SECTION.

- 16-89-105. Interpreters in criminal actions — Interpreters for the deaf.
- 16-89-106. Defendant on bail for felony indictment.
- 16-89-107. Trial of issues of law or fact.
- 16-89-108. Waivers of trial by jury and death penalty.
- 16-89-109. Oath of jury members.
- 16-89-110. Opening statements.
- 16-89-111. Evidence generally.
- 16-89-112. Evidence — Proof of certain acts or facts.
- 16-89-113. Evidence — Acquittal upon certain insufficient evidence.
- 16-89-114. Documents — Production generally.
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SECTION.

- 16-89-116. Documents — Discovery and inspection.
- 16-89-117. Limitation of witness fees in misdemeanor trials.
- 16-89-118. Conduct of jury.
- 16-89-119. Lack of jurisdiction.
- 16-89-120. Proof of higher offense.
- 16-89-121. Facts charged do not constitute offense.
- 16-89-122. Dismissal of indictment.
- 16-89-123. Order of final arguments.
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- 16-89-126. Verdict generally.
- 16-89-127. Verdict — Misdemeanor included in felony.
- 16-89-128. Polling of jury members.
- 16-89-129. Final adjournment.
- 16-89-130. New trial.

Publisher's Notes. Some provisions of this chapter may be superseded by the Arkansas Rules of Criminal Procedure, which became effective January 1, 1976.

Cross References. Right to interpreter, § 16-89-104.

Trial of criminal offenses where victim under age of 14, precedence, § 16-10-130.

Effective Dates. Acts 1877, No. 35, § 2: effective on passage.

Acts 1883, No. 3, § 2: effective on passage.

Acts 1915, No. 240, § 3: approved Mar. 24, 1915. Emergency declared.

Acts 1965, No. 489, § 1: Mar. 20, 1965. Emergency clause provided: "Whereas the Supreme Court of the United States in *Jackson v. Denno*, 378 U.S. — (1964) declared that the procedure for admitting confessions into evidence, identical to that now followed in this State, to be unconstitutional, an emergency is declared to exist and it is necessary in the public peace, health and safety that this Act take effect immediately and it shall therefore be in full force and effect from and after its passage and approval."

Acts 1971, No. 124, § 4: Feb. 19, 1971. Emergency clause provided: "The General Assembly finds it would expedite criminal procedure if the prosecuting attorney would be allowed to waive the death penalty. An emergency is therefore declared to

exist, and this Act, being necessary for the preservation of the public health, welfare and safety, shall be effective from and after its passage and approval."

Acts 1979, No. 664, § 5: Mar. 30, 1979. Emergency clause provided: "It is hereby found and determined by the Seventy-Second General Assembly that there is an immediate need to provide qualified interpreters for deaf persons at administrative, civil and criminal proceedings and that this Act is immediately necessary to accomplish the same. Therefore, an emergency is hereby declared to exist, and this Act being immediately necessary for the preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1991, No. 469, § 7: Mar. 12, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is an immediate need to protect the confidentiality of privileged communications between qualified interpreters for deaf and hearing-impaired persons occurring at administrative, civil and criminal proceedings and that this act is immediately necessary. Therefore, an emergency is hereby declared to exist, and this act being immediately necessary for the preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Adequacy of defense counsel's representation of criminal client regarding right to and incidents of jury trial. 3 ALR 4th 601.

Disqualification, for bias, of one offered as interpreter of testimony. 6 ALR 4th 158.

Sanctions against defense in criminal case for failure to comply with discovery requirements. 9 ALR 4th 837.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter. 12 ALR 4th 1016.

Prior representation or activity as prosecuting attorney as disqualifying judge from sitting or acting in criminal case. 16 ALR 4th 550.

Prosecutor's reference in opening statement to matters not provable or which he does not attempt to prove as ground for relief. 16 ALR 4th 810.

Continuances at instance of state public defender or appointed counsel over defendant's objections as excuse for denial of speedy trial. 16 ALR 4th 1283.

Waiver of right to counsel by insistence upon speedy trial in state criminal case. 19 ALR 4th 1299.

Jury's discussion of parole law as ground for reversal or new trial. 21 ALR 4th 420.

Propriety and effect of jurors' discussion of evidence among themselves before final submission of criminal case. 21 ALR 4th 444.

Right of prosecution to discovery of case-related notes, statements, and reports. 23 ALR 4th 799.

Waiver or loss of right to disqualify judge by participation in proceedings. 24 ALR 4th 870; 27 ALR 4th 597.

Disqualification of judge because of assault or threat against him by party or person associated with party. 25 ALR 4th 923.

Exclusion of evidence in state criminal action for failure or prosecution to comply with discovery requirements as to physical or documentary evidence. 27 ALR 4th 105.

Right of accused in state court to have expert inspect, examine, or test physical evidence in possession of prosecution. 27 ALR 4th 1188.

Disruptive conduct of spectators in presence of jury during criminal trial as basis for reversal, new trial, or mistrial. 29 ALR 4th 659.

Emotional manifestations by victim or family of victim during criminal trial as ground for reversal, new trial, or mistrial. 31 ALR 4th 229.

Propriety of juror's tests or experiments in jury room. 31 ALR 4th 566.

Prejudicial effect of jury's procurement or use of book during deliberations. 31 ALR 4th 623; 35 ALR 4th 626.

Instructions to jury respecting accused's absence from state criminal trial. 31 ALR 4th 676.

Failure to object to improper questions or comments as to defendant's pretrial silence or failure to testify as constituting waiver of right to complain. 32 ALR 4th 774.

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements as to statements made by defendants or other non-expert witnesses. 33 ALR 4th 301.

Communication between court officials or attendants and jurors in criminal trial as ground for mistrial or reversal — post-Parker cases. 35 ALR 4th 890.

Right of accused, in state criminal trial, to insist, over prosecutor's or court's objection, on trial by court without jury. 37 ALR 4th 304.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal. 38 ALR 4th 1170.

Impeachment of verdict by juror's evidence that he was coerced or intimidated by fellow juror. 39 ALR 4th 800.

Multiple juries at joint trial of multiple defendants in state criminal prosecution. 41 ALR 4th 1189.

Postretirement out of court communication between jurors and trial judge as grounds for new trial or reversal in criminal case. 43 ALR 4th 410.

Am. Jur. 75 Am. Jur. 2d, Trial, § 30 et seq.

Ark. L. Rev. Criminal Procedure: A Survey of Arkansas Law and the American Bar Association's Standards, 26 Ark. L. Rev. 169.

C.J.S. 23 C.J.S., Crim. L., § 961 et seq.

16-89-101. Trial times and postponements.

(a)(1) When any circuit court is duly convened for a regular term, the court shall remain open for all criminal proceedings until its next regular term and may be in session at any time the judge thereof may deem necessary. However, no session shall interfere with any other court to be held by the same judge.

(2) If the time has not been previously fixed by the court, or unless in such cases they are required by law to take notice, all interested parties shall receive notice of any proceeding affecting their rights and shall be given time to prepare to meet the proceeding.

(b)(1) If the defendant is in custody or on bail when the indictment is found, the trial may take place at the same term of the court on a day to be fixed by the court.

(2) If not tried at the same term, all indictments, together with all other criminal prosecutions and penal actions, shall be docketed for the first day of the next term of the court unless a different day is fixed by the order of the court.

(3) All prosecutions shall stand for trial on the day to which they are docketed, where the defendant is in custody, on bail, or has been summoned three (3) days before the commencement of the term.

(c)(1) When an indictment is called for trial, or at any time previous thereto, the court upon sufficient cause shown by either party may direct the trial to be postponed to another day in the same term or to another term.

(2) The provisions of the Code of Practice in Civil Cases of 1869, in regard to postponements of the trial of actions, shall apply to the postponement of prosecutions on behalf of a defendant.

(d) The prosecuting attorney shall not be required, in order to obtain a continuance of a criminal case, to make an affidavit to the causes for continuance. His official statement in writing shall be sufficient.

History. Rev. Stat., ch. 45, § 159; Crim. Code, §§ 186-190; C. & M. Dig., §§ 3126-3131; Init. Meas. 1936, No. 3, § 31, Acts 1937, p. 1384; Pope's Dig., §§ 3961-3967; A.S.A. 1947, §§ 43-1701 — 43-1707.

Publisher's Notes. For parallel refer-

ences to the provisions of the Code of Practice in Civil Cases of 1869, see the parallel reference tables in the tables volume.

Cross References. Plea of insanity not to prevent timely trial, § 16-86-101.

RESEARCH REFERENCES

Ark. L. Rev. Continuances in Arkansas, 4 Ark. L. Rev. 449.

Speedy Trial: A Comparative Analysis

Between the American Bar Association Standards of Criminal Justice and Arkansas Law, 25 Ark. L. Rev. 234.

CASE NOTES

ANALYSIS

Constitutionality.
Continuances.

—Absence of counsel.
—Absence of witnesses.
—Burden of proof.
—Discretion of court.

—Motion.

Continuous session.

Custody or bail.

Trial date.

Constitutionality.

Subdivision (c) (2) of this section is unconstitutional insofar as it makes § 16-63-402(b) applicable to criminal cases. *Graham v. State*, 50 Ark. 161, 6 S.W. 721 (1888).

Continuances.

Continuance will be refused when desired evidence is cumulative only. *Sneed v. State*, 47 Ark. 180, 1 S.W. 68 (1886); *Maxey v. State*, 66 Ark. 523, 52 S.W. 2 (1899); *Carroll v. State*, 71 Ark. 403, 75 S.W. 471 (1903); *Gallaher v. State*, 78 Ark. 299, 95 S.W. 463 (1906); *Owen v. State*, 86 Ark. 317, 111 S.W. 466 (1908); *Johnson v. State*, 89 Ark. 46, 115 S.W. 930 (1909); *Godard v. State*, 100 Ark. 149, 139 S.W. 1131 (1911); *Hamer v. State*, 104 Ark. 606, 150 S.W. 142 (1912); *Williams v. State*, 105 Ark. 698, 151 S.W. 1011 (1912); *Benson v. State*, 112 Ark. 442, 166 S.W. 549 (1914).

The expected evidence must be competent and material to the issue. *Hamilton v. State*, 62 Ark. 543, 36 S.W. 1054 (1896); *Kitts v. State*, 70 Ark. 521, 69 S.W. 545 (1902); *Adcock v. State*, 73 Ark. 625, 83 S.W. 318 (1904); *Pratt v. State*, 75 Ark. 350, 87 S.W. 651 (1905); *Harper v. State*, 79 Ark. 594, 96 S.W. 1003 (1906); *Morphew v. State*, 84 Ark. 487, 106 S.W. 480 (1907); *Strong v. State*, 85 Ark. 536, 109 S.W. 536 (1908); *Clampett v. State*, 91 Ark. 567, 121 S.W. 934 (1909); *Peters v. State*, 103 Ark. 119, 146 S.W. 491 (1912).

Continuance held to be properly denied. *Carroll v. State*, 71 Ark. 403, 75 S.W. 471 (1903); *Allison v. State*, 74 Ark. 444, 86 S.W. 409 (1904); *Rucker v. State*, 77 Ark. 23, 90 S.W. 151 (1905); *Hust v. State*, 77 Ark. 146, 91 S.W. 8 (1905); *Weatherford v. State*, 78 Ark. 36, 93 S.W. 61 (1906); *McFarland v. State*, 83 Ark. 98, 103 S.W. 169 (1907); *Renfroe v. State*, 84 Ark. 16, 104 S.W. 542 (1907); *Le Grand v. State*, 88 Ark. 135, 113 S.W. 1028 (1908); *Johnson v. State*, 89 Ark. 46, 115 S.W. 930 (1909); *McCarthy v. State*, 90 Ark. 384, 119 S.W. 647 (1909); *Clampett v. State*, 91 Ark. 567, 121 S.W. 934 (1909); *McRae v. State*, 92 Ark. 28, 122 S.W. 479 (1909); *Striplin v. State*, 100 Ark. 132, 139 S.W. 1128 (1911); *Walker v. State*, 100 Ark. 180, 139 S.W.

1139 (1911); *Hamer v. State*, 104 Ark. 606, 150 S.W. 142 (1912); *Bruder v. State*, 110 Ark. 402, 161 S.W. 1067 (1913); *Tolliver v. State*, 113 Ark. 142, 167 S.W. 703 (1914); *Quertermous v. State*, 114 Ark. 452, 170 S.W. 225 (1914); *Bryan v. State*, 179 Ark. 216, 15 S.W.2d 312 (1929); *Copeland v. State*, 226 Ark. 198, 289 S.W.2d 524 (1956); *Moore v. State*, 229 Ark. 335, 315 S.W.2d 907 (1958), cert. denied, 358 U.S. 946, 79 S. Ct. 356, 3 L. Ed. 2d 353 (1959); *Perez v. State*, 236 Ark. 921, 370 S.W.2d 613 (1963); *Jackson v. State*, 245 Ark. 331, 432 S.W.2d 876 (1968); *Thacker v. State*, 253 Ark. 864, 489 S.W.2d 500 (1973); *Wolfs v. State*, 255 Ark. 97, 498 S.W.2d 878 (1973); *Conway v. State*, 256 Ark. 131, 505 S.W.2d 758 (1974); *Derrick v. State*, 259 Ark. 316, 532 S.W.2d 431 (1976); *Russell v. State*, 262 Ark. 447, 559 S.W.2d 7 (1977).

Grounds for postponement frequently used, in addition to those provided in the civil procedure statutes, include physical or mental condition of defendant, objections to the jury, want of time for preparation, absence of counsel, and surprise at trial. *Perez v. State*, 236 Ark. 921, 370 S.W.2d 613 (1963).

—Absence of Counsel.

It was within the trial court's discretion to refuse a continuance because the defendant's counsel was absent from the state on account of the sickness of his wife. *Jefferson v. State*, 89 Ark. 129, 115 S.W. 1140 (1909).

An application for continuance in a criminal case upon the ground that the applicant was confined to jail and that on account of the sickness of his attorney he was unable to prepare his defense was properly denied when he failed to show wherein he was unable to prepare his defense. *Walker v. State*, 91 Ark. 497, 121 S.W. 925 (1909).

—Absence of Witnesses.

It was reversible error to refuse the defendant a continuance for an absent witness whose testimony was material to the defense, where the defendant used proper diligence to secure his attendance and it appeared that the witness was within the court's jurisdiction. *McElroy v. State*, 100 Ark. 301, 140 S.W. 8 (1911).

After court held that defendant was entitled to a continuance, it abused its discretion in overruling the defendant's

motion for continuance where state agreed to admit that the absent witness would testify to the facts as set out in the motion, but did not agree to admit that such facts were true. *Tiner v. State*, 110 Ark. 251, 161 S.W. 195 (1913).

An accused is entitled to compulsory process to compel the attendance of witnesses, and this means the right to a delay until witnesses may be had at the trial, when they are within the jurisdiction of the court, in all cases wherein the authority and power of the court has been properly invoked. *Carter v. State*, 196 Ark. 746, 119 S.W.2d 913 (1938).

In continuances in criminal cases where the state admits that absent witness would testify as claimed, the state must also admit the truthfulness of such statements of the absent witness. *Copeland v. State*, 226 Ark. 198, 289 S.W.2d 524 (1956).

Where evidence of absent witness is cumulative, the trial court may deny motion for continuance because of absence of the witness. *Copeland v. State*, 226 Ark. 198, 289 S.W.2d 524 (1956).

—Burden of Proof.

Burden was on defendant to introduce evidence to show prejudice resulted from court's denial of motion for continuance. *Perez v. State*, 236 Ark. 921, 370 S.W.2d 613 (1963).

—Discretion of Court.

The matter of continuance is addressed to the discretion of the trial court; its action will not be reversed in the absence of such a clear abuse of discretion as to amount to a denial of justice, and the burden of demonstrating abuse rests upon appellant. *Thompson v. State*, 26 Ark. 323 (1870); *Jackson v. State*, 54 Ark. 243, 15 S.W. 607 (1891); *Price v. State*, 57 Ark. 165, 20 S.W. 1091 (1893); *Kilgore v. State*, 99 Ark. 648, 137 S.W. 1092 (1911); *White v. State*, 105 Ark. 698, 152 S.W. 163 (1912); *Sullivan v. State*, 109 Ark. 407, 160 S.W. 239 (1913); *Perez v. State*, 236 Ark. 921, 370 S.W.2d 613 (1963); *Russell v. State*, 262 Ark. 447, 559 S.W.2d 7 (1977).

Abuse of discretion to grant or deny continuance is reversible error. *Cannon v. State*, 60 Ark. 564, 31 S.W. 150, 32 S.W. 128 (1895); *Jones v. State*, 99 Ark. 394, 138 S.W. 967 (1911); *Davey v. State*, 99 Ark. 547, 139 S.W. 629 (1911).

Granting or refusing a continuance will not authorize a reversal unless the trial court abuses its discretion. *Moore v. State*, 184 Ark. 682, 43 S.W.2d 228 (1931); *Perez v. State*, 236 Ark. 921, 370 S.W.2d 613 (1963).

—Motion.

Error cannot be assigned in the overruling of a motion for continuance on account of the absence of a witness if the motion fails to state where the witness resides or what is expected to be proved by him. *Shinn v. State*, 93 Ark. 290, 124 S.W. 263 (1910); *Davis v. State*, 95 Ark. 555, 129 S.W. 530 (1910).

An application for continuance on account of the absence of witnesses should specifically set forth the facts expected to be proved by the desired witnesses and not in general terms or by indefinite allegations. *Davis v. State*, 95 Ark. 555, 129 S.W. 530 (1910).

Motion for continuance in a criminal case because of absence of witness should state that the affiant believes that facts to which the witness would testify are true. *Freeman v. State*, 150 Ark. 387, 234 S.W. 267 (1921); *Estes v. State*, 180 Ark. 656, 22 S.W.2d 172 (1929).

The court may in its discretion grant an oral motion for continuance. *Venable v. State*, 177 Ark. 91, 5 S.W.2d 716 (1928).

In order to obtain a continuance because of the absence of a witness, it is necessary that the movant support his motion by affidavit stating what facts affiant believes the witness will prove, and not merely the effect of such facts in evidence. *Venable v. State*, 260 Ark. 201, 538 S.W.2d 286 (1976).

Continuous Session.

The proper procedure under this statute would be to take a recess and not adjourn the court. *Thomas v. State*, 196 Ark. 123, 116 S.W.2d 358 (1938).

Where circuit court recessed in one county without adjourning, it could hold a legal term in another county. *Thomas v. State*, 196 Ark. 123, 116 S.W.2d 358 (1938).

Subsection (a) applies to any circuit court. *Thomas v. State*, 196 Ark. 123, 116 S.W.2d 358 (1938).

If court had adjourned, and not to an adjourned day, in order to reconvene and be in session legally, the record of recon-

vening would have to show affirmatively a compliance with statutory provisions. *Fultz v. State*, 196 Ark. 1161, 121 S.W.2d 111 (1938).

In absence of adjourning order or expiration of term, it is presumed the court was in continuous session and statutes relating to posting of notice or reconvening of court have no application. *Fultz v. State*, 196 Ark. 1161, 121 S.W.2d 111 (1938).

Subsection (a) applies to the court, as distinguished from the judge, and where supplementary motion for new trial supported by affidavits and alleging incompetency of a juror was presented to trial judge in chambers in county other than that of trial, new matter was not properly in the record. *Sims v. State*, 203 Ark. 976, 159 S.W.2d 753 (1942).

After the judge of the court has convened court for the regular term, the judge then can adjourn and convene court to try criminal case as the judge "may deem necessary." *Bradley v. State*, 213 Ark. 927, 213 S.W.2d 901 (1948).

Custody or Bail.

The object of subdivision (b) (1) is to give priority, over other defendants, to the trial of persons who are in custody or on bail when they are indicted. *Shipley v. State*, 50 Ark. 49, 6 S.W. 226 (1887).

Although a defendant is not in custody or on bond, when indictment is found against him, he may, if arrested on a bench warrant, be tried at the term he is indicted, unless good cause be shown for postponement. *Shipley v. State*, 50 Ark. 49, 6 S.W. 226 (1887).

A person incarcerated in a sister state at the time of his indictment in this state

has the right to ask the state of Arkansas to extradite him for trial, but if the sister state refuses, subsection (b) (2) will not inure to his benefit, or if the sister state requires some kind of waiver which the prisoner does not accomplish, he cannot take advantage of subsection (b) (2); however, if the sister state does agree to the extradition upon conditions met, then Arkansas must extradite and try the prisoner with due diligence or he will be entitled to the benefit of subsection (b) (2). *Pellegrini v. Wolfe*, 225 Ark. 459, 283 S.W.2d 162 (1955).

Trial Date.

Where a trial has been properly conducted in other respects, a judgment of conviction will not be reversed simply because the record fails to show that the court set a day for trial. *Wallace v. State*, 28 Ark. 531 (1873).

Putting defendant to trial on day following filing of information cannot be presumed to be error where there is no record in regard to arraignment or whether arraignment was waived or whether defendants objected to going to trial at the time, or desired time for preparation. *Smith v. State*, 194 Ark. 1041, 110 S.W.2d 24 (1937).

Cited: *Price v. State*, 57 Ark. 165, 20 S.W. 1091 (1893); *Tiner v. State*, 110 Ark. 251, 161 S.W. 195 (1913); *State v. Harvey*, 169 Ark. 1074, 277 S.W. 869 (1925); *Givens v. State*, 243 Ark. 16, 418 S.W.2d 629 (1967), cert. denied, 390 U.S. 956, 88 S. Ct. 1051, 19 L. Ed. 2d 1149 (1968); *Roach v. State*, 255 Ark. 773, 503 S.W.2d 467 (1973); *Conway v. State*, 256 Ark. 131, 505 S.W.2d 758 (1974); *Worley v. State*, 533 S.W.2d 502 (Ark. 1976).

16-89-102. Severance.

(a) When two (2) or more defendants are jointly indicted for a misdemeanor, they may be tried jointly or separately in the discretion of the court.

(b) No trial on an indictment against two (2) or more defendants shall be delayed because some of the defendants have not been arrested. Those arrested or in custody shall be tried and the cause shall be continued as to those not arrested.

History. Rev. Stat., ch. 45, § 101; Crim. Code, § 236; C. & M. Dig., §§ 3038, 3139; Pope's Dig., §§ 3862, 3975; A.S.A.

1947, §§ 43-1801, 43-1803.

Cross References. Joinder of defendants, ARCrP 21.2.

CASE NOTES

Felon Codefendant.

It was not an abuse of discretion to deny defendant's motion for severance based upon the fact that his codefendant was a convicted felon brought from the peniten-

tiary for the trial, in the absence of any evidence in the record that the jury knew of such codefendant's status as a felon. *Booker v. State*, 244 Ark. 745, 427 S.W.2d 177 (1968).

16-89-103. Presence of defendant.

(a)(1) If the indictment is for a felony, the defendant must be present during the trial.

(2)(A)(i) If he or she escapes from custody after the trial has commenced or is present at the beginning of the trial and then causes himself or herself to be unable to appear at trial or if on bail shall absent himself or herself during the trial, the trial may either be stopped or progress to a verdict at the discretion of the court.

(ii) This provision shall apply in all instances except where the death penalty is sought.

(B) However, judgment shall not be rendered until the presence of the defendant is obtained.

(b) If the indictment is for a misdemeanor, the trial may be had in the absence of the defendant.

History. Crim. Code, §§ 184, 185; C. & M. Dig., §§ 3136, 3137; Pope's Dig., §§ 3972, 3973; A.S.A. 1947, §§ 43-2101, 43-2102; Acts 1997, No. 526, § 1.

CASE NOTES

ANALYSIS

Constitutionality.

Applicability.

Felony.

—Counsel.

—Presence not required.

—Presence required.

—Record.

—Voluntary absence.

Misdemeanor.

Trial not required.

Constitutionality.

Subsection (a) is constitutional. The guaranty of the Constitution does not include the right to abscond and then complain of one's own absence. *Gore v. State*, 52 Ark. 285, 12 S.W. 564 (1889).

Applicability.

The rule in subdivision (a)(2) of this section, that where a defendant is on bail and absents himself, the trial may proceed, applies once trial has commenced and does not apply to flight before trial.

Reece v. State, 325 Ark. 465, 928 S.W.2d 334 (1996).

Felony.

It is not necessary for the defendant to show that he was prejudiced by any action in his absence; his mere absence during a substantive part of the proceedings, where he may have lost an advantage or been prejudiced, is sufficient to set aside the conviction. *Bearden v. State*, 44 Ark. 331 (1884).

When it is plain that the accused has lost no advantage because of his absence, there is no error. *Mabry v. State*, 50 Ark. 492, 8 S.W. 823 (1888).

Defendant or his counsel may waive defendant's right to be present. *Davidson v. State*, 108 Ark. 191, 158 S.W. 1103 (1913); *Scruggs v. State*, 131 Ark. 320, 198 S.W. 694 (1917); *Boling v. State*, 189 Ark. 705, 74 S.W.2d 968 (1934); *Nelson v. State*, 190 Ark. 1027, 82 S.W.2d 519 (1935).

The right to be present ends with the trial and the trial ends with the verdict of the jury. *Baldwin v. State*, 119 Ark. 518, 178 S.W. 409 (1915).

—Counsel.

Right of defendant to have counsel present when verdict is returned is not ground for reversal if the defendant could not have been prejudiced by his absence. *Baker v. State*, 58 Ark. 513, 25 S.W. 603 (1894).

—Presence Not Required.

For the clerk to place the names of the panel in a box preparatory to drawing the jury for the trial is not a substantive step within the rule requiring the presence of defendant. *Bearden v. State*, 44 Ark. 331 (1884).

An order for venire for a jury was a substantive step, but the present method of selecting jurors to compose the panel is not and defendant's presence is not required. *Mabry v. State*, 50 Ark. 492, 8 S.W. 823 (1888).

Recognizance of witnesses is not a substantive step requiring the presence of defendant. *Boling v. State*, 54 Ark. 588, 16 S.W. 658 (1891).

Granting defendant a change of venue in his absence is not error. *Polk v. State*, 45 Ark. 165 (1885); *Bond v. State*, 63 Ark. 504, 39 S.W. 554 (1897).

Verdict is amendable in defendant's absence. *State v. McNamara*, 60 Ark. 400, 30 S.W. 762 (1895).

—Presence Required.

The accused must have the privilege of being present in person and by counsel whenever any substantive step is taken in his case. *Brown v. State*, 24 Ark. 620 (1867); *Whittaker v. State*, 173 Ark. 1172, 294 S.W. 397 (1927).

To swear the witnesses and put them under the rule is a substantive step requiring defendant's presence. *Bearden v. State*, 44 Ark. 331 (1884).

Taking testimony while defendant is necessarily absent a few minutes by permission of court is prejudicial error. *Bennett v. State*, 62 Ark. 516, 36 S.W. 947 (1896).

It is error to reread instructions in felony case in defendant's absence. *Kinnemer v. State*, 66 Ark. 206, 49 S.W. 815 (1899).

It is error for the judge, accompanied by the counsel on both sides, to enter the jury room after the cause has been submitted and deliver to the jury additional instructions without affording the defendant,

who was present in the court room, an opportunity to be present. *Stroope v. State*, 72 Ark. 379, 80 S.W. 749 (1904).

—Record.

The record, on appeal, must affirmatively show presence of defendant when any substantive step taken. *Brown v. State*, 24 Ark. 620 (1867).

The failure of the record on appeal to show affirmatively that the defendant in a bailable felony was present when the verdict was rendered is not a ground for reversal, as it will be presumed either that the defendant was voluntarily absent on bail or that he was present when the verdict was rendered. *Bond v. State*, 63 Ark. 504, 39 S.W. 554 (1897).

—Voluntary Absence.

If the defendant is on bail and absents himself, the trial may proceed. *Lee v. State*, 56 Ark. 4, 19 S.W. 16 (1892); *Darden v. State*, 73 Ark. 315, 84 S.W. 507 (1904), appeal dismissed, 200 U.S. 615, 26 S. Ct. 758, 50 L. Ed. 621 (1906); *Cox v. City of Jonesboro*, 112 Ark. 96, 164 S.W. 767 (1914).

When defendant disappeared during trial proceedings, court did not err in continuing trial in his absence since case had been specifically set for trial and defendant had indicated his readiness to proceed prior to voluntarily absenting himself. *Johnson v. State*, 270 Ark. 247, 604 S.W.2d 927 (1980), cert. denied, 450 U.S. 981, 101 S. Ct. 1517, 67 L. Ed. 2d 816 (1981).

Where defendant voluntarily absented himself from the courtroom by oversleeping, and a jury had been selected and sworn, and both sides had announced that they were ready for trial, the defendant's trial had commenced and was properly allowed to proceed without defendant present. *Reece v. State*, 325 Ark. 465, 928 S.W.2d 334 (1996).

Misdemeanor.

Court has discretion to refuse a trial for misdemeanor in the defendant's absence. *Bridges v. State*, 38 Ark. 510 (1882).

The state cannot demand a trial for misdemeanor in the absence of the defendant. *Owen v. State*, 38 Ark. 512 (1882); *Cox v. City of Jonesboro*, 112 Ark. 96, 164 S.W. 767 (1914). But see, *Henderson v. Town of Murfreesboro*, 119 Ark. 603, 178 S.W. 912 (1915).

Attorney's consent to try his client for a misdemeanor in his absence will be presumed to be by authority of the client in absence of proof to the contrary. *Martin v. State*, 40 Ark. 364 (1883).

Court should not permit a defendant to be tried in his absence, even with his consent, where the punishment may be imprisonment; but if it does so, and there is a verdict for imprisonment as part of his punishment, he cannot, after consenting, complain of it. *Martin v. State*, 40 Ark. 364 (1883).

If the offense is punishable by fine only, and defendant voluntarily absents himself, the state may demand a trial. *Henderson v. Murfreesboro*, 119 Ark. 603, 178 S.W. 912 (1915).

Where defendant appeals from a judgment of a justice of the peace and fails to appear, the circuit court has authority to affirm the penalty imposed, and the refusal to vacate the order by the circuit court will not be disturbed unless there is shown an abuse of discretion by the circuit court. *Jaynes v. State*, 212 Ark. 410, 206 S.W.2d 7 (1947).

If a trial on misdemeanor charge may be had in the absence of an accused, a plea may likewise be accepted in his absence. *Prine v. State*, 267 Ark. 304, 590 S.W.2d 25 (1979).

Arkansas Rule of Criminal Procedure 31.3's language that allows the defendant's attorney to waive a jury trial is

consistent with this section, which states that a defendant's presence is not required in misdemeanor cases. *Bolt v. State*, 314 Ark. 387, 862 S.W.2d 841 (1993).

Trial Not Required.

Subsection (b) of this section makes it permissible for a court to hold a trial for an accused misdemeanant in absentia; however, having a trial is not mandatory. *Taylor v. State*, 44 Ark. App. 106, 866 S.W.2d 849 (1993).

Although defendant's attorney appeared and requested that the trial be held, and defendant was absent, the circuit court did not abuse its discretion under subsection (b) of this section in declining to hold a trial, dismissing the appeal, and leaving the municipal court's judgment intact. *Taylor v. State*, 44 Ark. App. 106, 866 S.W.2d 849 (1993).

Circuit judge properly refused to hold the trial in defendant's absence, dismissed the appeal, and ordered that the municipal court sentence be put into execution because defendant failed to appear for trial. Court did not abuse its discretion in not holding the trial despite his absence. *Whitmire v. State*, 50 Ark. App. 34, 901 S.W.2d 20 (1995).

Cited: *Bell v. State*, 296 Ark. 458, 757 S.W.2d 937 (1988); *Cagle v. State*, 47 Ark. App. 1, 882 S.W.2d 674 (1994); *Clayton v. State*, 321 Ark. 602, 906 S.W.2d 290 (1995).

16-89-104. Interpreters in criminal actions generally.

(a) Every person who cannot speak or understand the English language or who because of hearing, speaking, or other impairment has difficulty in communicating with other persons and who is a defendant in any criminal action or a witness therein shall be entitled to an interpreter to aid the person throughout the proceeding.

(b)(1) An interpreter may be retained by the party or witness or, if the person is unable to pay for an interpreter, may be appointed by the court before which the action is pending and shall be appointed by the court before which the action is pending if the person is a defendant in the criminal action.

(2) If an interpreter is appointed by the court, the fee for the services of the interpreter shall be set by the court and shall be paid in the manner as the court may determine, except that an acquitted defendant shall not be required to pay any fee for the services of a court-appointed interpreter.

(3) If a certified foreign language interpreter from the roster is appointed by the court in a criminal matter, the judge may certify the

appointment to the Director of the Administrative Office of the Courts as provided in § 16-10-127(e)(1).

(c) Any court may inquire into the qualifications and integrity of any interpreter, and may disqualify any person from serving as an interpreter.

(d) Every interpreter for another person who is either a party or a witness in a court proceeding as referred to in this section shall take the following oath:

“Do you solemnly swear (or affirm) that you will justly, truly and impartially interpret to the oath about to be administered to him (her), and the questions which may be asked him (her), and the answers that he (she) shall give to such questions, relative to the cause now under consideration before this court, so help you God (or under the pains and penalties of perjury)?”

History. Acts 1973, No. 555, § 3; A.S.A. 1947, § 43-2101.1; Acts 2001, No. 424, § 3.

Publisher's Notes. This section may be affected by § 16-10-127.

Amendments. The 2001 amendment,

in (b)(1), deleted “himself” following “party or witness” and “one” preceding “may be appointed”; substituted “the” for “such” preceding “manner as the court” in (b)(2); and added (b)(3).

CASE NOTES

Irreversible Error.

Although there was evidence that defendant suffered from a hearing impairment, and should have been provided an interpreter, there was no reversible error in light of totality of evidence of defen-

dant's guilt. *Lawson v. State*, 74 Ark. App. 257, 47 S.W.3d 294 (2001).

Cited: *Swindle v. Benton County Circuit Court*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 439 (June 30, 2005).

16-89-105. Interpreters in criminal actions — Interpreters for the deaf.

(a) Every deaf person entitled to an interpreter under § 16-89-104 shall be entitled to a qualified interpreter as defined by this section.

(b) For the purpose of appointing an interpreter for the deaf under § 16-89-104:

(1)(A) “Qualified interpreter” means an interpreter certified by the National Registry of Interpreters for the Deaf or the Arkansas Registry of Interpreters for the Deaf or, in the event an interpreter so certified is not available, an interpreter who is otherwise qualified.

(B) Efforts to obtain the services of a qualified interpreter certified with a legal skills certificate or a comprehensive skills certificate will be made prior to accepting services of an interpreter with lesser certification.

(C) No qualified interpreter shall be appointed unless the appointing authority and the deaf person make a preliminary determination that the interpreter is able to readily communicate with the deaf person and is able to accurately interpret the statements of the deaf

person and interpret the proceedings in which a deaf person may be involved; and

(2)(A) "Oral interpreter" means a person who interprets language through facial and lip movements only and who does not use manual communication.

(B) An oral interpreter shall be provided upon the request of a deaf person who does not communicate in sign language.

(C) The right of a deaf person to an interpreter may not be waived except by a deaf person who does not use sign language and who initiates the request for waiver in writing. A waiver is subject to approval of counsel to the deaf person, if existent, and is subject to approval of the appointing authority.

(c) In the event a person who is deaf is arrested and taken into custody for any alleged violation of a criminal law of this state, the arresting officer and his or her superiors shall procure a qualified interpreter in order to properly interrogate the deaf person and to interpret the person's statement. No statement taken from the deaf person before an interpreter is present may be admissible in court.

(d) Every deaf person whose appearance before a proceeding entitles him or her to an interpreter should notify the appointing authority of his or her need prior to any appearance and should request at that time the services of an interpreter. Where a deaf person reasonably expects the need for an interpreter to be for a period greater than a single day, he or she should notify the appointing authority and the notification shall be sufficient for the duration of his or her participation in the proceedings.

(e) An appointing authority may require a person requesting the appointment of an interpreter to furnish reasonable proof of his or her deafness when the appointing authority has reason to believe that the person is not deaf.

(f) It shall be the responsibility of the appointing authority to channel requests for qualified interpreters through:

(1) The Arkansas Registry of Interpreters for the Deaf;

(2) The Department of Health and Human Services, Office for the Deaf and Hearing Impaired;

(3) The University of Arkansas at Little Rock Interpreter Training Program; or

(4) Any community resource wherein the appointing authority or the deaf person is knowledgeable that qualified interpreters can be found.

(g) Before a qualified interpreter participates in any proceedings subsequent to an appointment under the provisions of this section, the interpreter shall make an oath or affirmation that the interpreter will make a true interpretation in an understandable manner to the deaf person for whom he or she is appointed and that the interpreter will interpret the statements of the deaf person desiring that statements be made in the English language to the best of the interpreter's skill and judgment.

(h) The appointing authority shall provide recess periods as necessary for the interpreter when the interpreter so indicates.

(i) Any and all information that the interpreter gathers, learns from, or relays to the deaf person or person who is unable to communicate in English pertaining to any administrative, civil, or criminal proceeding shall at all times remain confidential and privileged on an equal basis with the attorney-client privilege, unless such deaf person or person who is unable to communicate in English desires that such information be communicated to other persons.

(j)(1) An interpreter appointed under the provisions of this section shall be entitled to a reasonable fee for the services.

(2) The fee shall be in accordance with standards established by the Arkansas Registry of Interpreters for the Deaf, in addition to actual expenses for travel and transportation.

(3)(A) When the interpreter is appointed by a court, the fee shall be paid out of general county funds.

(B) When the interpreter is otherwise appointed, the fee shall be paid out of funds available to the appointing authority.

History. Acts 1979, No. 664, §§ 1, 2; A.S.A. 1947, §§ 5-715.1, 5-715.2; Acts 1991, No. 469, § 2.

Publisher's Notes. This section may be affected by § 16-10-127.

Acts 1979, No. 664, §§ 1 and 2 are also codified as §§ 16-64-112, 25-15-102.

Cross References. Reimbursement for interpreter services, § 21-5-218.

RESEARCH REFERENCES

UALR L.J. Survey — Evidence, 14
UALR L.J. 793.

CASE NOTES

ANALYSIS

Purpose.

Motion to suppress.

Right to interpreter.

Statements prior to custody.

Purpose.

The intent of subsection (c) is to preclude statements made by a deaf person after arrest and while in custody for any alleged violation of a criminal law without the assistance of an interpreter. *Sanders v. State*, 310 Ark. 630, 839 S.W.2d 518 (1992).

Motion to Suppress.

The circuit court did not err in denying motion to suppress defendant's statement because no interpreter was made available; defendant was not deaf within the meaning of subsection (c) of this section, but was able to communicate in a normal conversational tone. *Hollamon v. State*, 312 Ark. 48, 846 S.W.2d 663 (1993).

Defendant suffered from a hearing loss, but she offered no evidence that her hearing loss would qualify her as deaf under § 16-10-127(f)(1); thus, an interpreter was not required under subsection (c) of this section and her motion to suppress her statement to the police was properly denied. *Lawson v. State*, 74 Ark. App. 257, 47 S.W.3d 294 (2001).

Right to Interpreter.

A deaf person is not entitled to an interpreter under this section until after he is arrested and taken into custody. *Sanders v. State*, 310 Ark. 630, 839 S.W.2d 518 (1992).

Statements Prior to Custody.

For statements made prior to arrest and being taken into custody, the legislature apparently intended the trier of fact to determine the accuracy of the officer's interpretation of the deaf person's communications. *Sanders v. State*, 310 Ark. 630, 839 S.W.2d 518 (1992).

The reference to an interpreter in the last sentence of subsection (c) refers to the first sentence and, therefore, the last sentence applies only when the deaf person

has become entitled to an interpreter pursuant to the first sentence. *Sanders v. State*, 310 Ark. 630, 839 S.W.2d 518 (1992).

16-89-106. Defendant on bail for felony indictment.

During the trial of an indictment for felony, when the defendant is on bail, he or she may remain on bail or be committed to and remain in the custody of the proper officer, as the court may direct.

History. Crim. Code, § 228; C. & M. Dig., § 3138; Pope's Dig., § 3974; A.S.A. 1947, § 43-2103.

Cross References. Bail during trial, § 16-84-111.

CASE NOTES

Custody.

There was no abuse of discretion in the trial court in ordering that defendant, who was on bail, be taken into custody during the trial when it was brought to the court's attention that he had indicated that he

might attempt to fix or tamper with the petit jury. *Reaves v. State*, 229 Ark. 453, 316 S.W.2d 824 (1958), cert. denied, 359 U.S. 944, 79 S. Ct. 723, 3 L. Ed. 2d 676 (1959).

16-89-107. Trial of issues of law or fact.

(a)(1) Issues of law shall be tried by the court.

(2) An issue of law arises on a demurrer to the indictment.

(3) All questions of law arising during the trial shall be decided by the court, and the jury shall be bound to take the decisions of the court on points of law as the law of the case.

(b)(1) Issues of fact shall be tried by a jury. However, the determination of fact concerning the admissibility of a confession shall be made by the court when the issue is raised by the defendant; the trial court shall hear the evidence concerning the admissibility and the voluntariness of the confession out of the presence of the jury, and it shall be the court's duty before admitting the confession into evidence to determine by a preponderance of the evidence that the confession has been made voluntarily.

(2) An issue of fact arises upon a plea of not guilty or of former acquittal or conviction.

History. Crim. Code, §§ 181-183, 234; C. & M. Dig., §§ 3082-3085, 3178; Pope's Dig., §§ 3908-3911, 4014; Acts 1965, No. 489, § 1; A.S.A. 1947, §§ 43-2104 — 43-2107, 43-2131.

Cross References. Right to trial by jury, Ark. Const., Art. 2, §§ 7, 10, Amend. No. 16.

RESEARCH REFERENCES

Ark. L. Rev. Note, *Arizona v. Fulminate*: Should Arkansas Courts Apply

Harmless Error Analysis to Coerced Confessions, 45 Ark. L. Rev. 1015.

CASE NOTES

ANALYSIS

Constitutionality.

Confessions.

—Appeal.

—Burden of proof.

—Factors considered.

—Hearing.

—Issue raised by defendant.

—Submission to jury.

—Sufficiency of evidence.

—Voluntariness.

Jury questions.

Right to jury trial.

Constitutionality.

This section is constitutional as to the degree of proof required for a finding that a confession was voluntarily made. *Ballew v. Sarver*, 320 F. Supp. 1233 (E.D. Ark. 1970).

Confessions.

Admission of confessions without determining voluntariness was reversible error. *Chenoweth v. State*, 247 Ark. 472, 445 S.W.2d 889 (1969).

The procedure outlined in this section, which requires the trial court to determine the voluntariness of confessions by a preponderance of the evidence, and an independent review on appeal are sufficient to meet the test that voluntariness be "fairly determined." *Ballew v. State*, 249 Ark. 480, 459 S.W.2d 577 (1970).

Although a hearing was conducted out of the presence of the jury, and the court determined the confession to be voluntary, under this section it was error for the court subsequently to limit cross-examination of the witness before the jury, excluding the circumstances bearing on the voluntariness of the confession. *Kagebein v. State*, 254 Ark. 904, 496 S.W.2d 435 (1973).

In ruling upon the suppression of a confession, each case must be determined by looking at the totality of the circumstances. This totality is subdivided into two main components; first, the statement of the officer, and second, the vulnerability of the defendant. *Holmes v. State*, 268 Ark. 601, 594 S.W.2d 267 (Ct. App. 1980); *State v. Graham*, 277 Ark. 465, 642 S.W.2d 880 (1982).

Deficiency in a ruling as to the voluntariness of a statement does not in itself

entitle the defendant to a new trial. The cause should be remanded to the trial court for an explicit determination of the issue of voluntariness, and a new trial should be ordered only if the trial judge finds the confession to have been involuntary. *Harris v. State*, 271 Ark. 568, 609 S.W.2d 48 (1980); *Moore v. State*, 309 Ark. 166, 828 S.W.2d 599 (1992).

The general policy of a sheriff's office as to whether a statement by a defendant must be written or oral is irrelevant to the determination of whether the defendant's statements were freely and voluntarily made. *Hayes v. State*, 274 Ark. 440, 625 S.W.2d 498 (1981), cert. denied, 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983), 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

The defendant waived any objections to the use of the statement made by him at the police station by placing it in evidence. *Williams v. State*, 288 Ark. 444, 705 S.W.2d 888 (1986).

A confession induced by a misleading promise of reward or threat of harm is not a voluntary statement. *Taylor v. State*, 288 Ark. 456, 706 S.W.2d 384 (1986).

The purpose of a hearing under this section is to prevent a jury from hearing a confession before the court determines whether it has been voluntarily given and not to restrict evidence after the court has made the determination of voluntariness. *Rucker v. State*, 320 Ark. 643, 899 S.W.2d 447 (1995).

—Appeal.

Where there is substantial evidence in the record to support the trial court's determination, that determination will not be disturbed on appeal. *Mullins v. State*, 240 Ark. 608, 401 S.W.2d 9 (1966).

Where the defendant at the hearing on voluntariness before the court made no objection, the court on appeal will not consider objections made thereafter. *DuBois v. State*, 258 Ark. 459, 527 S.W.2d 595 (1975).

The Supreme Court makes an independent determination of voluntariness, but does not reverse the trial court's findings unless they are clearly against the preponderance of the evidence. *Titus v. State*, 268 Ark. 9, 593 S.W.2d 164 (1980); *White*

v. State, 290 Ark. 130, 717 S.W.2d 784 (1986).

The Supreme Court reviews the entire record on the question of the voluntariness of an incriminating statement, but the court considers testimony offered after a hearing only when the point has been properly raised in the trial court. *Titus v. State*, 268 Ark. 9, 593 S.W.2d 164 (1980).

While an appellate court does not reverse the trial court's finding on the voluntariness of an in-custodial confession unless it is clearly erroneous, it does make an independent determination based on the totality of circumstances, with all doubts resolved in favor of individual rights and safeguards, to determine whether the holding of the trial court was erroneous. *State v. Graham*, 277 Ark. 465, 642 S.W.2d 880 (1982); *Free v. State*, 19 Ark. App. 84, 717 S.W.2d 215 (1986), rev'd on other grounds, 293 Ark. 65, 732 S.W.2d 452 (1987).

—Burden of Proof.

State has burden of proving the voluntariness of an in-custody confession by producing all the material witnesses or accounting for their absence. *Smith v. State*, 254 Ark. 538, 494 S.W.2d 489 (1973); *Russey v. State*, 257 Ark. 570, 519 S.W.2d 751 (1975); *Earl v. State*, 272 Ark. 5, 612 S.W.2d 98 (1981); *Williams v. State*, 278 Ark. 9, 642 S.W.2d 887 (1982).

State has burden of showing that the defendant's confession was made after a voluntary, knowing and intelligent waiver of the right to remain silent. *Cagle v. State*, 267 Ark. 1145, 594 S.W.2d 573 (Ct. App. 1980).

The burden to prove the confession's voluntariness in a hearing does not become the state's unless the defense challenges the voluntariness and moves to suppress. *Benedetti v. State*, 268 Ark. 571, 594 S.W.2d 61 (Ct. App. 1980).

The state bears the burden of proving by a preponderance of the evidence the voluntariness of an in-custodial confession. Any conflict in the testimony of different witnesses is for the trial court to resolve. *State v. Graham*, 277 Ark. 465, 642 S.W.2d 880 (1982).

There is a presumption that an in-custody confession is involuntary, and the burden is on the state to show the statement to have been voluntarily, freely, and understandably made, without fear or

hope of reward. *Free v. State*, 19 Ark. App. 84, 717 S.W.2d 215 (1986), rev'd on other grounds, 293 Ark. 65, 732 S.W.2d 452 (1987).

Where defendant's suppression motion raised the issue of involuntariness of his statements to police and where detective was a material witness connected with those controverted statements, it became the state's burden to produce detective at a suppression hearing or to explain his absence. *Bell v. State*, 324 Ark. 258, 920 S.W.2d 821 (1996).

—Factors Considered.

Factors to be considered in determining the voluntariness of the waiver of the right to remain silent include age, education, and intelligence of the accused, advice or lack of advice of constitutional rights, length of detention, repeated or prolonged questioning, and the use of mental or physical punishment. *Hatley v. State*, 289 Ark. 130, 709 S.W.2d 812 (1986); *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986).

A low intelligence quotient will not in itself render a waiver of the right to remain silent involuntary where the evidence shows the waiver was knowing and voluntary. *Hatley v. State*, 289 Ark. 130, 709 S.W.2d 812 (1986).

—Hearing.

It was permissible for prosecution to use a statement made by defendant while in custody to test the credibility of her testimony at the trial even though no hearing to determine the voluntariness of the prior statement was held. *Rooks v. State*, 250 Ark. 561, 466 S.W.2d 478 (1971).

Defendant was not deprived of his rights by a hearing on the voluntariness of his confession conducted in the presence of the jury where he made no objection to the procedure at the time. *Hill v. State*, 250 Ark. 812, 467 S.W.2d 179 (1971).

It was not necessary to submit the issue of the voluntariness of a confession to the jury in the absence of a defense request. The holding of a hearing in the judge's chambers on the admissibility of the confession was all that was required. *Furrow v. State*, 251 Ark. 757, 475 S.W.2d 524 (1972).

Defendant's statements to sheriff during his incarceration could be used by the prosecution to impeach defendant's testi-

mony without the requirement of a hearing held outside the presence of jury to determine its voluntariness. *Williams v. State*, 258 Ark. 207, 523 S.W.2d 377 (1975).

Evidence showed statements were not a confession within this section, so no in camera hearing was needed to test their voluntariness. *Workman v. State*, 267 Ark. 103, 589 S.W.2d 20 (1979).

Issue of voluntariness of defendant's statements was sufficiently raised at trial in a manner that required a hearing outside the presence of the jury on the voluntariness of the statements. *Bucy v. State*, 271 Ark. 768, 610 S.W.2d 576 (1981).

Trial court's failure to hold a hearing requested to determine the voluntariness of defendant's confession did not entitle defendant to a new trial; and case was remanded to trial court with instructions to conduct hearing and rule on the issue of voluntariness of defendant's confession. *Guinn v. State*, 27 Ark. App. 260, 771 S.W.2d 290 (1989).

The filing of a motion to strike the defendant's statement, with a certificate of service to the prosecuting attorney, sufficiently raised the issue of the voluntariness of the defendant's in-custody statement to require the court to hear the evidence concerning the admissibility and voluntariness of the statement out of the presence of the jury. *Moore v. State*, 303 Ark. 1, 791 S.W.2d 698 (1990).

—Issue Raised by Defendant.

The admissibility of defendant's custodial statements was clearly "raised by the defendant" by way of his pretrial motion to suppress; despite the State's contention that defendant abandoned his suppression effort by failing to object to the admissibility of the statements when they were introduced at trial, defendant's pretrial suppression motion was all that was required by this section to raise the issue to the trial court and trigger its obligation to hold a hearing. *Rankin v. State*, 329 Ark. 379, 948 S.W.2d 397 (1997).

A defendant is not required to raise the question of the admissibility of his incriminating custodial statements more than once. *Rankin v. State*, 329 Ark. 379, 948 S.W.2d 397 (1997).

—Submission to Jury.

Where trial judge and attorneys retired to judge's chambers and discussed ques-

tion of whether confessions was voluntary and judge, after finding confession was voluntary, submitted question to jury, procedure followed did not amount to reversible error. *Hall v. State*, 242 Ark. 201, 412 S.W.2d 603 (1967).

It was reversible error for the court to submit the question of the voluntariness of defendant's question to the jury rather than to determine the matter outside the presence of the jury. *Estep v. State*, 244 Ark. 843, 427 S.W.2d 535 (1968).

It was proper for trial court, in prosecution for first-degree murder, to refuse to submit issue of the voluntariness of appellant's confession to the jury and, as provided for by this section, to make its own finding as to voluntariness of the confession. *Walker v. State*, 253 Ark. 676, 488 S.W.2d 40 (1972).

Judge's statement to jury as to voluntariness amounted to a comment on the weight of the evidence and it was error to refuse to declare a mistrial. *Walker v. State*, 253 Ark. 676, 488 S.W.2d 40 (1972).

—Sufficiency of Evidence.

Evidence sufficient to show confession was voluntary and properly admissible. *Ballew v. Sarver*, 320 F. Supp. 1233 (E.D. Ark. 1970); *Gray v. State*, 253 Ark. 261, 485 S.W.2d 537 (1972); *Bell v. State*, 258 Ark. 976, 530 S.W.2d 662 (1975); *Hulsey v. State*, 261 Ark. 449, 549 S.W.2d 73 (1977), cert. denied, 439 U.S. 882, 99 S. Ct. 220, 58 L. Ed. 2d 194 (1978); *Holmes v. State*, 268 Ark. 601, 594 S.W.2d 267 (Ct. App. 1980); *Cagle v. State*, 267 Ark. 1145, 594 S.W.2d 573 (Ct. App. 1980); *Anderson v. State*, 267 Ark. 1169, 594 S.W.2d 54 (Ct. App. 1980); *Titus v. State*, 268 Ark. 9, 593 S.W.2d 164 (1980); *Harvey v. State*, 272 Ark. 19, 611 S.W.2d 762 (1981); *Spillers v. State*, 272 Ark. 212, 613 S.W.2d 387 (1981); *Jackson v. State*, 273 Ark. 107, 617 S.W.2d 13 (1981); *Hunes v. State*, 274 Ark. 268, 623 S.W.2d 835 (1981); *Davis v. State*, 275 Ark. 264, 630 S.W.2d 1 (1982); *Hallman v. State*, 288 Ark. 448, 706 S.W.2d 381 (1986); *Taylor v. State*, 288 Ark. 456, 706 S.W.2d 384 (1986); *Thomas v. State*, 289 Ark. 72, 709 S.W.2d 83 (1986); *Hatley v. State*, 289 Ark. 130, 709 S.W.2d 812 (1986); *Free v. State*, 19 Ark. App. 84, 717 S.W.2d 215 (1986); *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986); *Stone v. State*, 290 Ark. 204, 718 S.W.2d 102 (1986); *Kennedy v. State*, 325 Ark. 3, 923 S.W.2d 274 (1996).

Evidence sufficient to show defendant's confession was not voluntarily made. *Richardson v. State*, 274 Ark. 473, 625 S.W.2d 504 (1981); *State v. Graham*, 277 Ark. 465, 642 S.W.2d 880 (1982).

—Voluntariness.

There is a difference between the concept of an involuntary statement and a statement made without a knowing and intelligent waiver of one's constitutional rights; depending on the argument presented by the defendant in his suppression motion, a trial court should determine in the hearing whether the statement is inadmissible on account of its involuntariness or the lack of an effective waiver, or perhaps both of these grounds. *Rankin v. State*, 329 Ark. 379, 948 S.W.2d 397 (1997).

The language of subdivision (b)(1) appears to require the trial court to consider only whether a statement was "voluntary" when the admissibility of the statement has been raised by the defendant; however, the Supreme Court has clearly required the trial court, if the defendant has alleged that his statement is inadmissible due to the lack of a waiver, to consider in a suppression hearing whether the statement was made after a knowing and intelligent waiver of his constitutional rights. *Rankin v. State*, 329 Ark. 379, 948 S.W.2d 397 (1997).

Jury Questions.

When the issue involves a mixed question of law and fact, the jury may be judge of both law and facts themselves and are not bound by the law as declared by the court. *Robinson v. State*, 33 Ark. 180 (1878); *Sweeney v. State*, 35 Ark. 585 (1880).

It is within the exclusive province of the jury to determine, under proper instructions of the court, when the evidence is sufficient to convict; the court is without right to point out what inference may be drawn from particular facts in proof.

Spivey v. State, 133 Ark. 314, 198 S.W. 101 (1917).

Circuit court erred in overruling appellant's motion for a jury trial on her fine for violating a municipal speeding ordinance. *Johnston v. City of Pine Bluff*, 258 Ark. 346, 525 S.W.2d 76 (1975).

Issues of fact must be tried by a jury; judges are prohibited from charging juries with regard to matters of fact (Ark. Const., Art. 7, § 23). *Foster v. Lockhart*, 811 F. Supp. 1363 (E.D. Ark. 1992), *aff'd*, 9 F.3d 722 (8th Cir. 1993).

Determining credibility of witnesses is within a jury's domain. *Scroggins v. State*, 312 Ark. 106, 848 S.W.2d 400 (1993).

Right to Jury Trial.

Defendant, who appealed his conviction for driving his car left of center to the circuit court, had no need to demand or move for a trial by jury, much less obtain a ruling on the issue and thus the trial court erred in not honoring his right to be tried by a jury. *Elmore v. State*, 305 Ark. 426, 809 S.W.2d 370 (1991).

Cited: *Murphy v. State*, 248 Ark. 794, 454 S.W.2d 302 (1970); *Murphy v. State*, 255 Ark. 398, 500 S.W.2d 394 (1973); *McConahay v. State*, 257 Ark. 328, 516 S.W.2d 887 (1974); *Woodard v. State*, 261 Ark. 895, 553 S.W.2d 259 (1977); *Selph v. State*, 264 Ark. 197, 570 S.W.2d 256 (1978); *Shiras v. Britt*, 267 Ark. 97, 589 S.W.2d 18 (1979); *Spillers v. Housewright*, 692 F.2d 524 (8th Cir. 1982); *Hall v. State*, 276 Ark. 245, 634 S.W.2d 115 (1982); *Harrell v. City of Conway*, 296 Ark. 247, 753 S.W.2d 542 (1988); *Stevenson v. State*, 25 Ark. App. 318, 759 S.W.2d 220 (1988); *Davis v. State*, 308 Ark. 481, 825 S.W.2d 584 (1992); *Dillon v. State*, 311 Ark. 529, 844 S.W.2d 944 (1993); *Jones v. State*, 314 Ark. 383, 862 S.W.2d 273 (1993), *cert. denied*, 512 U.S. 1237, 114 S. Ct. 2743, 129 L. Ed. 2d 863 (1994); *Noble v. State*, 319 Ark. 407, 892 S.W.2d 477 (1995); *State v. Webb*, 323 Ark. 80, 913 S.W.2d 259 (1996); *Matthews v. State*, 327 Ark. 70, 938 S.W.2d 545 (1997).

16-89-108. Waivers of trial by jury and death penalty.

(a) In all criminal cases, except where a sentence of death may be imposed, trial by a jury may be waived by the defendant, provided the prosecuting attorney gives his or her assent to the waiver. The waiver and the assent thereto shall be made in open court and entered of

record. In the event of waiver, the trial judge shall pass both upon the law and the facts.

(b) In all criminal cases where the punishment is death, the prosecuting attorney, with permission of the court, may waive the death penalty and in those cases punishment cannot be fixed at more than life imprisonment.

(c) In all criminal cases where the maximum punishment is death by electrocution and the defendant waives a trial by jury, the court must determine that the defendant's waiver is voluntary and is not made in response to any promise or threat and that the waiver is freely made without fear or compulsion.

History. Init. Meas. 1936, No. 3, § 28, Acts 1937, p. 1384; Pope's Dig., § 3912; Acts 1971, No. 124, §§ 1, 2; A.S.A. 1947, §§ 43-2108 — 43-2108.2.

Cross References. Assent by prosecutor, ARCrP 31.1.

Capitol felonies, ARCrP 31.4.

Personal request, ARCrP 31.2.

Waiver of death penalty, § 5-4-608.

CASE NOTES

ANALYSIS

Agreements.

Credibility of witnesses.

Death penalty.

Evidence.

Knowing and intelligent waiver.

Prosecutor's consent.

Punishment.

Agreements.

There is no federal rule binding the state courts to use a 12-member jury in state criminal prosecutions, and an agreement to proceed with an 11-member jury in accordance with state law and court rules is not a violation of the constitutional right to trial by jury. *Vinston v. Lockhart*, 850 F.2d 420 (8th Cir. 1988).

Credibility of Witnesses.

Where the trial court sits as a jury, the court is sole judge of the credibility of witnesses. *Maples v. State*, 225 Ark. 785, 286 S.W.2d 15 (1956).

Death Penalty.

In no case where a death sentence may be imposed may a jury be waived. *Carson v. State*, 198 Ark. 112, 128 S.W.2d 373 (1939); *Scarber v. State*, 226 Ark. 503, 291 S.W.2d 241 (1956).

Evidence.

Evidence sufficient to show that defendant's right to trial by jury was not vio-

lated. *Ford v. State*, 222 Ark. 16, 257 S.W.2d 30 (1953); *Moore v. State*, 241 Ark. 335, 407 S.W.2d 744 (1966).

Knowing and Intelligent Waiver.

Presuming waiver of right to a jury trial from a silent record is impermissible; the record must demonstrate that the defendant knowingly, intelligently, and understandingly waived his right to a jury trial, and anything less is not waiver. *Williamson v. Lockhart*, 636 F. Supp. 1298 (E.D. Ark. 1986).

Where the defendant was never made aware, either by the trial court or his attorney, that the choice confronting him was to be tried by jury of his peers, or to have his guilt or innocence determined by the judge, the defendant was deprived of sufficient information to make a knowing and intelligent waiver of the right to a jury trial. *Williamson v. Lockhart*, 636 F. Supp. 1298 (E.D. Ark. 1986).

Prosecutor's Consent.

The assent of the prosecuting attorney to defendant's waiver of a trial by jury was for the benefit of the state and not the defendant, and his failure to assent did not invalidate the waiver. *Scates v. State*, 244 Ark. 333, 424 S.W.2d 876 (1968).

Although the record failed to show the prosecuting attorney affirmatively gave his consent to defendant's waiver of a jury trial, such consent was presumed from his

presence at the time the waiver was made and his failure to object. *Scates v. State*, 244 Ark. 333, 424 S.W.2d 876 (1968).

Where the prosecuting attorney did not give his assent to the waiver by defendants of their right to a jury trial, the court did not err in compelling trial by jury for possession of marijuana. *Hooper v. State*, 257 Ark. 103, 514 S.W.2d 394 (1974).

Requirement under subsection (a) of this section and Ark. R. Crim. P. 31.1, that a prosecutor approve defendant's request to plead guilty and waive a jury trial, did not violate defendant's due process rights

because the sentencing scheme codified at §§ 16-90-801 — 16-90-804 did not create a liberty interest in protecting from exposure to higher ranges of sentences. *Whitlow v. State*, 357 Ark. 290, 166 S.W.3d 45 (2004).

Punishment.

State's waiver of the death penalty did not preclude the jury from sentencing the accused to life imprisonment without parole. *Butler v. State*, 261 Ark. 369, 549 S.W.2d 65 (1977).

Cited: *Johnston v. City of Pine Bluff*, 258 Ark. 346, 525 S.W.2d 76 (1975).

16-89-109. Oath of jury members.

When a jury of twelve (12) qualified jurors shall have been duly impaneled, they shall be sworn substantially as follows:

"You, and each of you, do solemnly swear, that you will well and truly try the case of the State of Arkansas against A. B., and a true verdict render, unless discharged by the court or withdrawn by the parties."

History. Crim. Code, § 219; C. & M. Dig., § 3170; Pope's Dig., § 4006; A.S.A. 1947, § 43-2109.

CASE NOTES

ANALYSIS

Constitutionality.
Delay in swearing.
Jeopardy.
Mandatory nature.
Record.
Separate swearing.
Time to object.

Constitutionality.

The oath prescribed for the petit jury by this section is not in violation of the Constitution; it in effect requires the jury to try the case according to the law and the evidence. *Palmore v. State*, 29 Ark. 248 (1874).

Delay in Swearing.

Evidence insufficient to show that delay in swearing jury prejudiced defendant's rights to a jury trial, fair trial or due process. *Cooper v. Campbell*, 597 F.2d 628 (8th Cir.), cert. denied, 444 U.S. 852, 100 S. Ct. 106, 62 L. Ed. 2d 69; 444 U.S. 979, 100 S. Ct. 479, 62 L. Ed. 2d 69 (1979).

Jeopardy.

When the jury is finally sworn to try the case, jeopardy has attached to the accused, and when, without the consent of the defendants, expressed or implied, the jury is discharged before the case is completed, then the constitutional right against double jeopardy may be invoked, except only in cases of "overruling necessity." *Jones v. State*, 230 Ark. 18, 320 S.W.2d 645 (1959).

Mandatory Nature.

The jury in criminal cases must take this oath regardless of the grade of the crime; the general oath administered to the regular panel will not suffice. *Chiles v. State*, 45 Ark. 143 (1885); *Tong v. State*, 169 Ark. 708, 276 S.W. 1004 (1925).

Record.

Where the record fails to show that the trial jury, in a felony case, were sworn in that case, a judgment of conviction will be reversed. *Lawson v. State*, 25 Ark. 106 (1868); *Barbour v. State*, 37 Ark. 61 (1881).

Where the record shows that the jurors were sworn, but the form of oath administered is not set out in the entries, it will be presumed by the Supreme Court, in the absence of any showing to the contrary, that the oath was administered to the jurors in proper form. *Hurley v. State*, 29 Ark. 17 (1874); *Lay v. State*, 42 Ark. 105 (1883).

If the form of oath administered is entered of record, and appears not to be in substance and legal effect the oath prescribed by law, it will be error. *Anderson v. State*, 34 Ark. 257 (1879).

Fact that jury was sworn must be shown by record. *Tong v. State*, 169 Ark. 708, 276 S.W. 1004 (1925).

Nunc pro tunc order showing the fact in the judgment that the jury was sworn as provided by law, entered subsequently to the filing of original transcript in the Supreme Court, was proper. *Harrison v. State*, 200 Ark. 257, 138 S.W.2d 785 (1940).

16-89-110. Opening statements.

- (a) The prosecuting attorney may then:
 - (1) Read the indictment to the jury;
 - (2) State the defendant's plea to the indictment and the punishment prescribed by law for the offense; and
 - (3) Make a brief statement of the evidence on which the state relies.
- (b) The defendant or his or her counsel may then make a brief statement of the defense and the evidence upon which the defendant relies.

History. Crim. Code, §§ 220, 221; C. & M. Dig., §§ 3171, 3172; Pope's Dig., §§ 4007, 4008; A.S.A. 1947, §§ 43-2110, 43-2111.

CASE NOTES

ANALYSIS

Delaying opening statement.
Failure to require statement.
Instructions.
Prosecutor's remarks.
Reading of indictment.
Statement by assistant.
Time of statement.

Delaying Opening Statement.

Criminal defendant was only allowed the opportunity to delay his opening statement until the close of the state's evidence where he made such a request at the

Separate Swearing.

When the regular panel is exhausted, and the deficiency of jurors is supplied by talesmen, they may be sworn separately, as they are selected. *Hurley v. State*, 29 Ark. 17 (1874).

Time to Object.

A defendant in a misdemeanor prosecution waives his right to object that the jurors were improperly sworn unless he objects before going to trial. *Ruble v. State*, 51 Ark. 126, 10 S.W. 23 (1888).

After verdict, it is too late to object that the jurors were not sworn in accordance with the statute. *Meadors v. State*, 130 Ark. 471, 197 S.W. 1153 (1917).

It is not error on a charge of manslaughter to be tried by a jury of eleven men, where appellant not only agreed in open court to a jury of eleven, but made no objections, saved no exceptions and did not assign this as error in his motion for a new trial. *Ford v. State*, 222 Ark. 16, 257 S.W.2d 30 (1953).

appropriate time, the trial court assented, the state failed to object, and the defendant expected to put on some evidence following the opening statement. *Lamar v. State*, 347 Ark. 846, 68 S.W.3d 294 (2002).

Failure to Require Statement.

The trial being before the court without a jury, and there being no request for an opening statement, it was within the court's discretion to proceed with the trial without opening statements, and failure of the court to require opening statements did not violate defendant's federal constitutional right to a fair trial. *Richards v.*

State, 266 Ark. 733, 585 S.W.2d 375 (Ct. App. 1979).

Instructions.

In view of this section, reading the information to the jury as one of the instructions, where affidavit of prosecuting attorney was not read, was not error. *Malone v. State*, 202 Ark. 796, 152 S.W.2d 1019 (1941).

Prosecutor's Remarks.

So long as the statement as to what the prosecutor expects to prove is made in good faith and not of a nature calculated to create a prejudicial impression, the failure of the evidence to substantiate the opening statement will not justify the setting aside of a conviction. *McFalls v. State*, 66 Ark. 16, 48 S.W. 492 (1898); *Sheptine v. State*, 133 Ark. 239, 202 S.W. 225 (1918).

Prosecutor's remark in opening statement was not in error. *Nelson v. State*, 139 Ark. 13, 212 S.W. 93 (1919); *Mills v. State*, 188 Ark. 107, 64 S.W.2d 83 (1933).

It is bad practice to permit the state's attorney, in a murder case, to read the testimony taken at the coroner's inquest as part of his opening statement. *Gehl v. State*, 179 Ark. 206, 15 S.W.2d 396 (1929).

Prosecutor's remark in his opening statement resulted in pre-evidentiary coercion which may have forced the defendant to testify against her will. *Clark v.*

State, 256 Ark. 658, 509 S.W.2d 812 (1974).

Reading of Indictment.

In view of this section, there was no error in permitting the deputy prosecutor to read indictment to jury in murder prosecution. *Baxter v. State*, 225 Ark. 239, 281 S.W.2d 931 (1955).

Statement by Assistant.

The opening statement may be made by an attorney assisting the prosecution. *Tiner v. State*, 115 Ark. 494, 172 S.W. 1010 (1914).

Time of Statement.

Defendant cannot be required to make an opening statement, but he cannot require the state to offer its evidence and then make his opening statement. *McDaniels v. State*, 187 Ark. 1163, 63 S.W.2d 335 (1933).

It was reversible to refuse to permit defense counsel to make an opening statement at the close of the state's evidence after assenting, without objection from the state, to his reserving his statement until such time at the close of the state's opening statement. *Jackson v. State*, 249 Ark. 653, 460 S.W.2d 319 (1970).

Cited: *Jenkins v. State*, 222 Ark. 511, 261 S.W.2d 784 (1953); *Jackson v. State*, 249 Ark. 653, 460 S.W.2d 319 (1970).

16-89-111. Evidence generally.

(a) The state must then offer the evidence in support of the indictment.

(b) The defendant or his or her counsel must then offer the defendant's evidence in support of his or her defense.

(c) The parties may then respectively offer rebutting evidence only, unless the court for good reason, in furtherance of justice, permits them to offer evidence upon their original cases.

(d) A confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied with other proof that the offense was committed.

(e)(1)(A) A conviction or an adjudication of delinquency cannot be had in any case of felony upon the testimony of an accomplice, including in the juvenile division of circuit court, unless corroborated by other evidence tending to connect the defendant or the juvenile with the commission of the offense.

(B) The corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof.

(2) However, a conviction may be had in misdemeanor cases upon the testimony of an accomplice.

History. Crim. Code, §§ 222-224, 239, 240; Acts 1883, No. 3, § 1, p. 2; C. & M. Dig., §§ 3173-3175, 3181, 3182; Pope's Dig., §§ 4009-4011, 4017, 4018; A.S.A. 1947, §§ 43-2112 — 43-2116; Acts 2001, No. 903, § 1.

Amendments. The 2001 amendment

made gender neutral changes in (b); substituted "cases" for "case" in (c); redesignated former (e)(1) as present (e)(1)(A)-(B); and, in (e)(1)(A), inserted "or an adjudication of delinquency," "including in juvenile court" and "or the juvenile."

RESEARCH REFERENCES

Ark. L. Rev. Note, Corroboration of Confessions in the Theft by Receiving Context: Is Proof of Theft Enough?, 44 Ark. L. Rev. 805.

UALR L.J. Survey of Arkansas Law, Evidence, 1 UALR L.J. 191.

Arkansas Law Survey, Smith, Evidence, 9 UALR L.J. 165.

CASE NOTES

ANALYSIS

Constitutionality.

Applicability.

Accomplice testimony.

—Accomplice defined.

—Appeal.

—Burden of proof.

—Corroboration.

—By defendant.

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—In general.

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Confrontation rights.

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—Misdemeanors.

Post-conviction relief.

Rebuttal or reopening.

State's evidence.

Constitutionality.

The more stringent corroboration requirements in the case of accomplice testimony does not violate the equal protection clause as there is a legitimate rationale for greater safeguards when a defendant's conviction is based on the testimony of a third person rather than on

his own words. *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996), cert. denied, 519 U.S. 898, 117 S. Ct. 246, 136 L. Ed. 2d 174 (1996).

Applicability.

Subsection (d) of this section does not require that a confession be corroborated by other evidence in order to sustain a conviction; subsection (d) deals only with the sufficiency of the evidence to sustain a conviction, and not mere admissibility. *McVay v. State*, 312 Ark. 73, 847 S.W.2d 28 (1993).

Subsection (d) was inapplicable in a prosecution for driving on a suspended driver's license, notwithstanding the defendant's argument that the only evidence to support his conviction was his uncorroborated confession, as the defendant's admission to the arresting officer that his license had been suspended was only one element of the offense of driving with a suspended license; the criminal act of driving with a suspended license was established by the defendant's admission in conjunction with the officer's testimony that the defendant was the only person in the vehicle. *White v. State*, 73 Ark. App. 264, 42 S.W.3d 584 (2001).

Court properly admitted juvenile's statements at a probation revocation proceeding to her probation officer regarding taking drugs because § 9-27-321 protected juveniles from Miranda violations in a pre-adjudication context, not at a revocation hearing; in addition, the state-

ment was properly admitted because the statement was offered to prove that defendant had violated the terms of her probation. *K.N. v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 95 (Feb. 10, 2005).

Accomplice Testimony.

Where an accomplice's confession was cross-implicating, even though enough other evidence was available from accomplice for conviction, the court was ordered to sever the case for retrial. *Kerr v. State*, 256 Ark. 738, 512 S.W.2d 13 (1974), cert. denied, 419 U.S. 1110, 95 S. Ct. 783, 42 L. Ed. 2d 806 (1975).

Testimony of an accomplice is insufficient to justify conviction of a felony, even though the court and jury believe the testimony. The reason for this rule is that the instinct for survival renders the testimony of an accomplice less than completely credible. *Foster v. State*, 290 Ark. 495, 720 S.W.2d 712 (1986), cert. denied, 482 U.S. 929, 107 S. Ct. 3213, 96 L. Ed. 2d 700 (1987).

An accomplice's testimony must be corroborated by other evidence. The corroboration must be sufficient standing alone to establish the commission of the offense and to connect the defendant with it; it may be circumstantial evidence as long as it is substantial. *David v. State*, 295 Ark. 131, 748 S.W.2d 117 (1988); *Franklin v. State*, 311 Ark. 601, 845 S.W.2d 525 (1993); *Hogue v. State*, 323 Ark. 515, 915 S.W.2d 276 (1996).

—Accomplice Defined.

One who with full knowledge that a crime has been committed conceals it from the magistrate or harbors and protects the criminal is an accomplice. *Polk v. State*, 36 Ark. 117 (1880).

An accomplice is one who could himself be convicted of the crime charged against the defendant, either as principal or accessory. *Simon v. State*, 149 Ark. 609, 233 S.W. 917 (1921); *Henderson v. State*, 174 Ark. 835, 297 S.W. 836 (1927); *McClure v. State*, 214 Ark. 159, 215 S.W.2d 524 (1948); *Haven v. State*, 217 Ark. 153, 228 S.W.2d 1003 (1950).

Receiver of stolen goods and thief from whom he received them are accomplices within the meaning of this section. *Long v. State*, 192 Ark. 1089, 97 S.W.2d 67 (1936).

Ordinarily the question of whether a witness is an accomplice is a mixed ques-

tion of fact and law and must be submitted to the jury where the evidence is in dispute. *Jackson v. State*, 193 Ark. 776, 102 S.W.2d 546 (1937); *Clayton v. State*, 247 Ark. 643, 447 S.W.2d 319 (1969); *Shrader v. State*, 13 Ark. App. 17, 678 S.W.2d 777 (1984); *Woodward v. State*, 16 Ark. App. 18, 696 S.W.2d 759 (1985).

One jointly indicted with defendant, if evidence tends to show his or her connection with the commission of the offense, even though such evidence be meager and unsatisfactory, is to be regarded as an accomplice. *Jackson v. State*, 193 Ark. 776, 102 S.W.2d 546 (1937).

Where question as to whether or not one is an accomplice is submitted to jury, its finding on the subject is final, unless the testimony shows conclusively that the witness was an accomplice. *Jackson v. State*, 193 Ark. 776, 102 S.W.2d 546 (1937); *Shrader v. State*, 13 Ark. App. 17, 678 S.W.2d 777 (1984).

Victim not an accomplice. *Waterman v. State*, 202 Ark. 934, 154 S.W.2d 813 (1941); *Wise v. State*, 204 Ark. 743, 164 S.W.2d 897 (1942); *Havens v. State*, 217 Ark. 153, 228 S.W.2d 1003 (1950).

Evidence sufficient to show that question of whether witness was an accomplice was waived by the defendant. *Trotter v. State*, 215 Ark. 121, 219 S.W.2d 636 (1949).

One who buys a controlled substance is not an accomplice of the person who sells or delivers it. *Sweatt v. State*, 251 Ark. 650, 473 S.W.2d 913 (1971); *Long v. State*, 260 Ark. 417, 542 S.W.2d 742 (1976); *Brizendine v. State*, 4 Ark. App. 19, 627 S.W.2d 26 (1982); *Barnes v. State*, 15 Ark. App. 153, 691 S.W.2d 178 (1985); *Williams v. State*, 290 Ark. 449, 720 S.W.2d 305 (1986), aff'd, 292 Ark. 616, 732 S.W.2d 135 (1987).

Grant of immunity alone does not cause a witness to be an accomplice as a matter of law. *Scherrer v. State*, 294 Ark. 287, 742 S.W.2d 884 (1988).

Failure to inform law enforcement officers of crime does not make one an accomplice as a matter of law. *Scherrer v. State*, 294 Ark. 287, 742 S.W.2d 884 (1988).

Mere presence at scene of a crime does not make one an accomplice. *Scherrer v. State*, 294 Ark. 287, 742 S.W.2d 884 (1988).

A buyer of illicit drugs is not an accom-

plice of the seller. *Talley v. State*, 312 Ark. 271, 849 S.W.2d 493 (1993).

The fact that a witness has been granted immunity is not a basis to rule that the witness is an accomplice as a matter of law. *State v. Young*, 315 Ark. 656, 869 S.W.2d 691 (1994).

Where witness lured murder victim to the murder site, but there was no evidence that witness had knowledge of the crime that was going to occur, the facts did not show conclusively that witness was an accomplice as a matter of law. *King v. State*, 323 Ark. 671, 916 S.W.2d 732 (1996).

—Appeal.

Where an appeal by the state in a felony case presents only the question of the sufficiency of the corroborating testimony of the appellee's accomplice in the commission of the crime charged, it will be denied, since that is a question of fact and the Supreme Court's opinion could not serve as a precedent for the trial of other cases founded on a similar charge. *State v. Massey*, 194 Ark. 439, 107 S.W.2d 527 (1937).

State conceded at trial that the witness was an accomplice; therefore, Supreme Court could not question that fact on appeal. *DuBois v. State*, 254 Ark. 543, 494 S.W.2d 700 (1973).

The appellate court reviews the sufficiency of corroborating evidence by the test of whether the verdict is supported by substantial evidence, which means whether the fact finder could have reached the verdict without resorting to speculation and conjecture; in such cases the court merely determines whether the circumstantial evidence tends to some degree to connect the defendant with the commission of the crime and does not look to see whether every other reasonable hypothesis but that of guilt has been excluded. *Roe v. State*, 7 Ark. App. 263, 647 S.W.2d 483 (1983).

If an accused must be acquitted if the state's case is based on the uncorroborated testimony of an accomplice, then that determination on appeal prohibits retrial just as it does when acquittal occurs at the trial; the reason for reversal is not "error," but insufficiency of the state's proof. *Foster v. State*, 290 Ark. 498, 722 S.W.2d 869, cert. denied, 482 U.S. 929, 107 S. Ct. 3213, 96 L. Ed. 2d 700 (1987).

On appeal, the inquiry is, or should be, not whether the court views the corroborating evidence as sufficient, but whether there is substantial evidence to support the jury's finding that the corroborating evidence was sufficient. In determining whether there is substantial evidence to support the jury's finding that the corroborating evidence was sufficient, the court need only consider testimony lending support to the jury verdict and may disregard any testimony that could have been rejected by the jury on the basis of credibility. *Maynard v. State*, 21 Ark. App. 20, 727 S.W.2d 858 (1987).

Where state court reverses a conviction because the prosecution fails to corroborate accomplice testimony as required by this section, such a reversal is one based on evidentiary insufficiency, and therefore, a second prosecution is barred by the double jeopardy clause of the federal constitution. *DuBois v. Lockhart*, 859 F.2d 1314 (8th Cir. 1988).

State supreme court would not overturn trial judge, sitting as fact finder, who found that a witness was not an accomplice; defendant's conviction of aggravated robbery, in part based on the witness' testimony, was affirmed. *Gray v. State*, 311 Ark. 209, 843 S.W.2d 315 (1992).

Despite not asking for a jury instruction that witness was an accomplice as a matter of law and it was necessary for the state to produce evidence connecting defendant to the crime, independent of witness' testimony, the issue of an erroneous denial of a directed verdict motion on insufficient corroborative evidence was preserved for appeal. *Hogue v. State*, 323 Ark. 515, 915 S.W.2d 276 (1996).

In an appeal from the trial court's grant of a directed verdict of not guilty in defendant's murder trial, the state sought to have the Supreme Court determine whether the corroborating evidence submitted was sufficient to connect defendant to the offense under the accomplice-corroboration statute, but any decision in response to that portion of the state's appeal would have required consideration of the application of the statute to the specific facts of the case, which the Supreme Court would not do in appeals by the state. *State v. Fuson*, 355 Ark. 652, 144 S.W.3d 250 (2004).

—Burden of Proof.

A person must first be found to be an

accomplice under § 5-2-403 for the requirement of corroborative evidence to come into play under subdivision (e)(1) of this section; it is the burden of the defendant to prove that a witness is an accomplice whose testimony must be corroborated. *Rockett v. State*, 319 Ark. 335, 891 S.W.2d 366 (1995).

Testimony of accomplices must be corroborated, but evidence corroborating accomplice testimony need not be sufficient standing alone to sustain the conviction; however, it must tend to connect the defendant to a substantial degree with the commission of the crime independent of the accomplice's testimony. *Tate v. State*, 84 Ark. App. 184, 137 S.W.3d 404 (2003).

—Corroboration.

Corroboration of testimony may be supplied by proof of the acts, conduct, or declarations of the party informed against, either before or after the commission of the crime. *Long v. State*, 192 Ark. 1089, 97 S.W.2d 67 (1936). For cases discussing the use of tape recordings as corroborating evidence, see *Miller v. State*, 230 Ark. 168, 321 S.W.2d 199 (1959).

This section requiring corroboration for felony convictions does not apply to the revocation of a previous suspension of sentence and, thus, the uncorroborated testimony of an accomplice is sufficient basis for the revocation of a suspension of sentence. *Townsend v. State*, 256 Ark. 570, 509 S.W.2d 311 (1974); *Ellerson v. State*, 261 Ark. 525, 549 S.W.2d 495 (1977).

Corroboration may be furnished by the acts, conduct, declarations or testimony of the accused; false statements to the police and flight by an accused may constitute corroborating evidence. On the other hand, an explanation by the accused of suspicious circumstances may be considered in determining whether the evidence corroborating the accomplice's testimony is sufficient. *Henderson v. State*, 279 Ark. 435, 652 S.W.2d 16 (1983).

Admission of uncorroborated accomplice testimony in penalty phase of capital case did not violate this section prohibiting conviction on the basis of uncorroborated accomplice testimony. *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984).

That the legislature chose 16 years as the age of accountability for purposes of

the crime of incest does not mean that it also intended that when an unwilling victim of incest is 16 years old, then corroboration is required. The testimony of the 16-year old victim of incest did not require corroboration under this section where the intercourse was not with her consent, as evidenced by her running away following the incident and her refusal to stay at home. *Camp v. State*, 288 Ark. 269, 704 S.W.2d 617 (1986).

The requirement of corroboration is satisfied by proof that crime was committed by someone. *Shells v. State*, 22 Ark. App. 62, 733 S.W.2d 743 (1987).

Flight by an accused may constitute a corroborating circumstance. *Jimenez v. State*, 24 Ark. App. 76, 749 S.W.2d 331 (1988).

Corroboration is not needed as to every detail supplied by an accomplice. *York v. Lockhart*, 856 F.2d 61 (8th Cir. 1988), cert. denied, 490 U.S. 1026, 109 S. Ct. 1759, 104 L. Ed. 2d 195 (1989).

The corroborating evidence must establish the commission of the crime and tend to connect the accused with the crime. *York v. Lockhart*, 856 F.2d 61 (8th Cir. 1988), cert. denied, 490 U.S. 1026, 109 S. Ct. 1759, 104 L. Ed. 2d 195 (1989); *McDonald v. State*, 37 Ark. App. 61, 824 S.W.2d 396 (1992).

There is no requirement that each element of the crime attested to by the accomplice be corroborated by independent testimony; rather, if an accomplice is corroborated as to some particular fact or facts, the jury is authorized to infer that he speaks the truth as to all. *York v. Lockhart*, 856 F.2d 61 (8th Cir. 1988), cert. denied, 490 U.S. 1026, 109 S. Ct. 1759, 104 L. Ed. 2d 195 (1989).

The corroboration required by subdivision (e)(1) is directed toward proof of the criminal offense and not to venue or jurisdictional facts, for which corroboration is not required. *Lee v. State*, 27 Ark. App. 198, 770 S.W.2d 148 (1989), cert. denied, 493 U.S. 847, 110 S. Ct. 142, 107 L. Ed. 2d 101 (1989).

Corroborating evidence is evidence which tends to connect the accused with the commission of the crime, but is something less than that evidence necessary to sustain a conviction.

Corroboration need not be so substantial in and of itself to sustain a conviction.

Hogue v. State, 323 Ark. 515, 915 S.W.2d 276 (1996).

Corroborative evidence held sufficient to connect defendant to the crime. Hogue v. State, 323 Ark. 515, 915 S.W.2d 276 (1996).

Where defendant was on trial for misdemeanor theft, testimony of his brother, an accomplice, alone was sufficient to support a conviction. Guthrie v. State, 52 Ark. App. 145, 915 S.W.2d 739 (1996).

Testimony of accomplice to the victim's kidnapping prior to the murder was sufficiently corroborated to support defendant's conviction for first-degree murder. Peeler v. State, 326 Ark. 423, 932 S.W.2d 312 (1996).

Although the evidence independent of the accomplice's testimony was sufficient to establish that the crimes were committed and that the defendant was near the scene of the crime, such evidence was not sufficient corroborative evidence to satisfy the requirement of subdivision (e)(1). Pickett v. State, 55 Ark. App. 261, 935 S.W.2d 281 (1996).

Trial court erred in granting a new trial pursuant to ARCrP 37.1 where defendant counsel's inadvertent failure to request a jury instruction regarding accomplice corroboration would not have changed the result of the trial. State v. Slocum, 332 Ark. 207, 964 S.W.2d 388 (1998).

The accomplice-corroboration rule does not apply to juvenile proceedings. Munhall v. State, 337 Ark. 41, 986 S.W.2d 863 (1999).

The testimony of an accomplice was sufficiently corroborated in a murder prosecution where (1) the defendant admitted that he and the accomplice were with the victim shortly before the victim was killed, (2) other witnesses testified to inculpatory statements made by the defendant, and (3) there was some physical evidence that tied the defendant to the murder. Marta v. State, 336 Ark. 67, 983 S.W.2d 924 (1999).

Standing alone, the corroboration for a felony conviction based upon accomplice testimony must be sufficient to establish the commission of the offense and to connect the defendant with it. Henderson v. State, 337 Ark. 518, 990 S.W.2d 530 (1999).

The test for corroborating evidence is whether, if the testimony of the accomplice were totally eliminated from the

case, the other evidence independently establishes the crime and tends to connect the accused with its commission. Henderson v. State, 337 Ark. 518, 990 S.W.2d 530 (1999).

Circumstantial evidence qualifies as corroborating evidence, but it must be substantial, although not so substantial in and of itself to sustain a conviction. Henderson v. State, 337 Ark. 518, 990 S.W.2d 530 (1999).

In a prosecution for felony-murder, the evidence was sufficient to corroborate the testimony of an accomplice where (1) the medical examiner testified that the victim died of a gunshot wound to the chest, (2) a witness testified that the defendant was involved in a conversation with his accomplices about robbing a dice game at the scene of the crime, (3) another witness identified the defendant from a photo-lineup as one of the men who approached the scene of the crime just before the victim was shot, and (4) another witness testified that three or four men approached the scene of the crime and one of them was facing the victim just before she heard the gunshot that killed him. Flowers v. State, 342 Ark. 45, 25 S.W.3d 422 (2000).

In a prosecution for aggravated robbery and theft of property, testimony of another witness corroborated the testimony of an accomplice by establishing the commission of the crime and by tending to connect the defendants with the crime's commission. Rose v. State, 72 Ark. App. 175, 35 S.W.3d 365 (2000).

Testimony of victim and defendant's confession to police sufficiently corroborated testimony of defendant's two accomplices that defendant had been a knowing and willing participant in the robbery of a mailman. Johnson v. State, 75 Ark. App. 81, 55 S.W.3d 298 (2001).

Murder of woman who allegedly gave defendant the AIDS virus was corroborated by evidence other than that provided by an accomplice to the murder where another witness saw defendant shove the murder victim into a car and defendant's nervous actions right after the murder. Martin v. State, 346 Ark. 198, 57 S.W.3d 136 (2001).

Testimony of a murder defendant's accomplice that defendant repeatedly asked him to kill the victim was adequately corroborated by defendant's testimony ad-

mitting these requests. *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002).

Where witnesses identified the state's exhibit as being the gold handgun used during the robbery and chose defendant's photograph out of a photo lineup as looking like the robber, and identified defendant as looking like the robber in the courtroom, and where an accomplice testified the gun belonged to his sister, the accomplice's testimony that he drove defendant to the store and waited as defendant robbed the store was sufficiently corroborated and defendant's motion for a directed verdict was properly denied. *Jones v. State*, 349 Ark. 331, 78 S.W.3d 104 (2002).

Defendant was properly convicted as an accomplice in a murder of a 15-year-old girl the codefendant had allegedly impregnated where evidence other than the testimony of the codefendant connected defendant with the commission of the offense; evidence showed that defendant provided the murder weapon, that defendant helped the killer prepare for the murder by selecting a grave site to dispose of the body, and that defendant assisted the killer in planning so as to avoid evidence that could connect him to the murder. *Davis v. State*, 350 Ark. 22, 86 S.W.3d 872 (2002).

Testimony of the accomplice was admissible where other evidence independently established the accomplice's description of the double murder; the medical examiner's testimony that one victim died as a result of being stabbed, having his throat cut, and to a lesser extent, blunt force trauma, an officer's testimony that defendant was found with the other victim's car, and testimony that defendant's van contained substantial blood from the victims, were all in accordance with the accomplice's testimony of how they had disposed of the bodies. *Baughman v. State*, 353 Ark. 1, 110 S.W.3d 740 (2003).

Much of the testimony against defendant was provided by defendant's girlfriend, who helped defendant plan and carry out the murder, and there was substantial corroboration of the girlfriend's testimony in the form of physical evidence and the testimony of other witnesses, thus, there was no merit to defendant's claim that the trial court denied his motion for a directed-verdict. *Holder v. State*, 354 Ark. 364, 124 S.W.3d 439 (2003).

Evidence that defendant was found in a residence containing drug paraphernalia and an odor associated with the manufacture of methamphetamine and that he attempted to avoid detection and arrest corroborated the testimony of the accomplices and tended to connect defendant with the commission of the offense of possession of drug paraphernalia. *Breshears v. State*, 83 Ark. App. 159, 119 S.W.3d 61 (2003).

Co-defendant was properly convicted as an accomplice to the offenses of robbery and kidnapping where the victim testified that two people were present during the beating and a city marshal testified that he saw co-defendant at the scene of the crime; this evidence was sufficient to corroborate the accomplice testimony provided by defendant. *Millholland v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 220 (Mar. 24, 2004).

Evidence was sufficient to sustain a conviction for aggravated robbery and to corroborate the accomplice's testimony where witnesses testified as to the role defendant played in the robbery and described his clothing and weapon, which were collected at the scene. *Flowers v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 510 (June 22, 2005).

—By Defendant.

A voluntary confession of a defendant, made to one who is not an accomplice, is sufficient to corroborate the testimony of an accomplice. *Knowles v. State*, 113 Ark. 257, 168 S.W. 148 (1914); *Porter v. State*, 206 Ark. 758, 177 S.W.2d 408 (1944).

The testimony of the defendant alone may be sufficient corroboration of an accomplice. *Ford v. State*, 205 Ark. 706, 170 S.W.2d 671 (1943); *York v. Lockhart*, 856 F.2d 61 (8th Cir. 1988), cert. denied, 490 U.S. 1026, 109 S. Ct. 1759, 104 L. Ed. 2d 195 (1989).

Corroborating acts of defendant properly considered by court and jury. *McClure v. State*, 214 Ark. 159, 215 S.W.2d 524 (1948).

Defendant's acts and testimony held to corroborate accomplice testimony. *Coston v. State*, 10 Ark. App. 242, 663 S.W.2d 187 (1984); *Walker v. State*, 13 Ark. App. 124, 680 S.W.2d 915 (1984).

—Circumstantial Evidence.

Circumstantial evidence may be sufficient to corroborate an accomplice, al-

though of itself it would not justify a verdict of guilty, where it is unequivocal and certain in character, of a material nature, and tends to connect the defendant with the crime. *Roath v. State*, 185 Ark. 1039, 50 S.W.2d 985 (1932); *Mullen v. State*, 193 Ark. 648, 102 S.W.2d 82 (1937).

Where circumstantial evidence is utilized to support accomplice testimony, all facts of the evidence can be considered to constitute a chain sufficient to present a question for the resolution by the jury as to the adequacy of the corroboration and the court will not look to see whether every other reasonable hypothesis but that of guilt has been excluded. *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982).

Where circumstantial evidence is utilized, all facets of the evidence may be considered to constitute a chain sufficient to present the question for the resolution by the fact finder as to the adequacy of the corroboration. *Roe v. State*, 7 Ark. App. 263, 647 S.W.2d 483 (1983); *McDonald v. State*, 37 Ark. App. 61, 824 S.W.2d 396 (1992).

The corroborating evidence may be circumstantial, but it must be of a material nature and legitimately tend to connect the accused with the commission of the crime. *Henderson v. State*, 279 Ark. 435, 652 S.W.2d 16 (1983); *Meeks v. State*, 317 Ark. 411, 878 S.W.2d 403 (1994).

The connecting evidence may be circumstantial but it must be substantial. *Jimenez v. State*, 24 Ark. App. 76, 749 S.W.2d 331 (1988).

Evidence corroborating testimony of an accomplice must tend to connect accused with the crime and be independent of evidence given by the accomplice. Corroborating evidence may be circumstantial if it is substantial, but need not be so substantial as to support a conviction without the testimony of the accomplice. *Lee v. State*, 27 Ark. App. 198, 770 S.W.2d 148 (1989), cert. denied, 493 U.S. 847, 110 S. Ct. 142, 107 L. Ed. 2d 101 (1989).

Where defendant was in the room where drug manufacturing materials were found during execution of a search warrant, under subdivision (e)(1) of this section, such evidence and accomplice testimony against defendant was sufficient evidence support defendant's drug possession and manufacturing convictions. *Tate*

v. State, 357 Ark. 369, 167 S.W.3d 655 (2004).

—Juvenile Proceedings.

The accomplice-corroboration rule does not apply to juvenile proceedings. *Swanner v. State*, 73 Ark. App. 4, 37 S.W.3d 697 (2001).

—Question of Law.

Where the testimony of the witnesses showed conclusively that they were accomplices and took part in the conspiracy, the question of whether they were accomplices for purposes of this section is one of law for the trial judge to determine. *Williams v. State*, 328 Ark. 487, 944 S.W.2d 822 (1997).

—Sufficiency.

For cases discussing standards for determining sufficiency of corroboration, see: *Polk v. State*, 36 Ark. 117 (1880); *Ernest v. State*, 120 Ark. 148, 179 S.W. 174 (1915); *Brewer v. State*, 137 Ark. 243, 208 S.W. 290 (1918); *Hill v. State*, 144 Ark. 642, 218 S.W. 197 (1920); *Brown v. State*, 143 Ark. 523, 222 S.W. 377 (1920); *Strum v. State*, 168 Ark. 1012, 272 S.W. 359 (1925); *Powell v. State*, 177 Ark. 938, 9 S.W.2d 583 (1928); *Yates v. State*, 182 Ark. 179, 31 S.W.2d 295 (1930); *Fleeman v. State*, 204 Ark. 772, 165 S.W.2d 62 (1942); *Casteel v. State*, 205 Ark. 82, 167 S.W.2d 634 (1943); *Ford v. State*, 205 Ark. 706, 170 S.W.2d 671 (1943); *Underwood v. State*, 205 Ark. 864, 171 S.W.2d 304 (1943); *Thompson v. State*, 207 Ark. 680, 182 S.W.2d 386 (1944); *Bright v. State*, 212 Ark. 852, 208 S.W.2d 168 (1948); *McClure v. State*, 214 Ark. 159, 215 S.W.2d 524 (1948); *Froman v. State*, 232 Ark. 697, 339 S.W.2d 601 (1960); *Shipp v. State*, 241 Ark. 120, 406 S.W.2d 361 (1966); *Pitts v. State*, 247 Ark. 434, 446 S.W.2d 222 (1969); *Petron v. State*, 252 Ark. 945, 481 S.W.2d 722 (1972); *Gardner v. State*, 263 Ark. 739, 569 S.W.2d 74 (1978), cert. denied, 440 U.S. 911, 99 S. Ct. 1224, 59 L. Ed. 2d 460 (1979); *Bly v. State*, 267 Ark. 613, 593 S.W.2d 450 (1980); *Price v. State*, 267 Ark. 1172, 599 S.W.2d 394 (Ct. App. 1980); *Paladino v. State*, 2 Ark. App. 234, 619 S.W.2d 693 (1981); *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982); *Walker v. State*, 277 Ark. 137, 639 S.W.2d 742 (1982); *Lear v. State*, 278 Ark. 70, 643 S.W.2d 550 (1982); *Mackey v. State*, 279 Ark. 307, 651 S.W.2d 82 (1983); *Hender-*

son v. State, 279 Ark. 435, 652 S.W.2d 16 (1983); Orsini v. State, 281 Ark. 348, 665 S.W.2d 245, cert. denied, 469 U.S. 847, 105 S. Ct. 162, 83 L. Ed. 2d 98 (1984); Redmon v. State, 282 Ark. 353, 668 S.W.2d 541 (1984); Linell v. State, 283 Ark. 162, 671 S.W.2d 741 (1984); Bennett v. State, 284 Ark. 87, 679 S.W.2d 202 (1984); Kennel v. State, 15 Ark. App. 45, 689 S.W.2d 5 (1985); Combs v. State, 286 Ark. 74, 690 S.W.2d 712 (1985); Stephens v. State, 15 Ark. App. 352, 693 S.W.2d 64 (1985); Lipsmeyer v. State, 16 Ark. App. 14, 695 S.W.2d 848 (1985); Woodward v. State, 16 Ark. App. 18, 696 S.W.2d 759 (1985); Evans v. State, 287 Ark. 136, 697 S.W.2d 879 (1985); Hart v. State, 301 Ark. 200, 783 S.W.2d 40 (1990); Davis v. State, 310 Ark. 582, 839 S.W.2d 182 (1992); Hughey v. State, 310 Ark. 721, 840 S.W.2d 183 (1992); Henderson v. State, 337 Ark. 518, 990 S.W.2d 530 (1999).

Evidence held sufficient to corroborate testimony of accomplice. Chancellor v. State, 76 Ark. 215, 88 S.W. 880 (1905); Larimore v. State, 84 Ark. 606, 107 S.W. 165 (1907); Roberts v. State, 96 Ark. 58, 131 S.W. 60 (1910); Townsend v. State, 148 Ark. 573, 231 S.W. 1 (1921); Mullen v. State, 193 Ark. 648, 102 S.W.2d 82 (1937); Fleeman v. State, 204 Ark. 772, 165 S.W.2d 62 (1942); Webb v. State, 206 Ark. 640, 176 S.W.2d 915 (1944); Padgett v. State, 212 Ark. 716, 207 S.W.2d 719 (1948); Trotter v. State, 215 Ark. 121, 219 S.W.2d 636 (1949); Beasley v. State, 219 Ark. 452, 242 S.W.2d 961 (1951); Knight v. State, 228 Ark. 502, 308 S.W.2d 821 (1958); Lauderdale v. State, 233 Ark. 96, 343 S.W.2d 422 (1961); Nolen v. State, 239 Ark. 681, 393 S.W.2d 765 (1965); Clayton v. State, 247 Ark. 643, 447 S.W.2d 319 (1969); Henson v. State, 248 Ark. 992, 455 S.W.2d 101 (1970); Thacker v. State, 253 Ark. 864, 489 S.W.2d 500 (1973); King v. State, 254 Ark. 509, 494 S.W.2d 476 (1973); Jackson v. State, 256 Ark. 406, 507 S.W.2d 705 (1974); Anderson v. State, 256 Ark. 912, 511 S.W.2d 151 (1974); Hubbard v. State, 258 Ark. 472, 527 S.W.2d 608 (1975); Dyas v. State, 260 Ark. 303, 539 S.W.2d 251 (1976); Olles v. State, 260 Ark. 571, 542 S.W.2d 755 (1976); Coffey v. State, 261 Ark. 687, 550 S.W.2d 778 (1977); Burnett v. State, 262 Ark. 235, 556 S.W.2d 653 (1977), cert. denied, 435 U.S. 944, 99 S. Ct. 1525, 55 L. Ed. 2d 540 (1978); Bly v. State, 267 Ark. 613, 593

S.W.2d 450 (1980); Smithey v. State, 269 Ark. 538, 602 S.W.2d 676 (1980); Gipson v. State, 271 Ark. 700, 610 S.W.2d 261 (1981); Brewer v. State, 271 Ark. 810, 611 S.W.2d 179 (1981); Sargent v. State, 272 Ark. 366, 614 S.W.2d 507 (1981); Paladino v. State, 2 Ark. App. 234, 619 S.W.2d 693 (1981); Rhodes v. State, 276 Ark. 203, 634 S.W.2d 107 (1982); Walker v. State, 277 Ark. 137, 639 S.W.2d 742 (1982); Roe v. State, 7 Ark. App. 263, 647 S.W.2d 483 (1983); Mackey v. State, 279 Ark. 307, 651 S.W.2d 82 (1983); Rhodes v. State, 280 Ark. 156, 655 S.W.2d 421 (1983); Rayford v. State, 284 Ark. 519, 683 S.W.2d 911 (1985); Kennel v. State, 15 Ark. App. 45, 689 S.W.2d 5 (1985); Evans v. State, 287 Ark. 136, 697 S.W.2d 879 (1985); Johnson v. State, 289 Ark. 589, 715 S.W.2d 441 (1986); Thrash v. State, 291 Ark. 575, 726 S.W.2d 283 (1987); Stickley v. State, 294 Ark. 44, 740 S.W.2d 616 (1987); Maynard v. State, 21 Ark. App. 20, 727 S.W.2d 858 (1987); Moore v. State, 296 Ark. 30, 751 S.W.2d 345 (1988); Johnson v. State, 303 Ark. 12, 792 S.W.2d 863 (1990); Taylor v. State, 303 Ark. 586, 799 S.W.2d 519 (1990); McDonald v. State, 37 Ark. App. 61, 824 S.W.2d 396 (1992); Gibson v. State, 41 Ark. App. 154, 852 S.W.2d 326 (1993); Andrews v. State, 344 Ark. 606, 42 S.W.3d 484 (2001).

Insufficient evidence of burglary and theft of property was presented to corroborate the testimony of an admitted accomplice. Gibson v. State, 41 Ark. App. 154, 852 S.W.2d 326 (1993).

The amount of the corroborating evidence necessary is a question for the jury. Kennedy v. State, 115 Ark. 480, 171 S.W. 878 (1914); Powell v. State, 177 Ark. 938, 9 S.W.2d 583 (1928); Mankey v. State, 192 Ark. 901, 96 S.W.2d 463 (1936); Mullen v. State, 193 Ark. 648, 102 S.W.2d 82 (1937); Smith v. State, 199 Ark. 900, 136 S.W.2d 673 (1940); McClure v. State, 214 Ark. 159, 215 S.W.2d 524 (1948); Knight v. State, 228 Ark. 502, 308 S.W.2d 821 (1958).

Evidence held insufficient to corroborate testimony of accomplice. London v. State, 204 Ark. 189, 161 S.W.2d 207 (1942); Bright v. State, 212 Ark. 852, 208 S.W.2d 168 (1948); Miller v. State, 230 Ark. 168, 321 S.W.2d 199 (1959); Paschal v. State, 245 Ark. 396, 432 S.W.2d 879 (1968); DuBois v. State, 254 Ark. 543, 494 S.W.2d 700 (1973); Cockrell v. State, 256

Ark. 19, 505 S.W.2d 204 (1974); *Dunn v. State*, 256 Ark. 508, 508 S.W.2d 555 (1974); *Prather v. State*, 256 Ark. 581, 509 S.W.2d 309 (1974); *Olles v. State*, 260 Ark. 571, 542 S.W.2d 755 (1976); *Pollard v. State*, 264 Ark. 753, 574 S.W.2d 656 (1978); *Pace v. State*, 267 Ark. 610, 593 S.W.2d 20 (1980); *Roleson v. State*, 272 Ark. 346, 614 S.W.2d 656 (1981); *Redmon v. State*, 282 Ark. 353, 668 S.W.2d 541 (1984); *Combs v. State*, 286 Ark. 74, 690 S.W.2d 712 (1985); *Meeks v. State*, 317 Ark. 411, 878 S.W.2d 403 (1994).

The corroboration of an accomplice's testimony required by this section is sufficient if it shows independently that a crime occurred and the accused was connected with its commission. *Johnson v. State*, 289 Ark. 589, 715 S.W.2d 441 (1986); *Foster v. State*, 290 Ark. 495, 720 S.W.2d 712 (1986).

The question of sufficiency of the corroborating evidence to justify submission of the question of a defendant's guilt, must, of necessity, be governed by the facts and circumstances of the particular case, having regard for the nature of the crime, the character of the accomplice's testimony, and the general requirements with respect to corroboration. *Maynard v. State*, 21 Ark. App. 20, 727 S.W.2d 858 (1987).

Admissible hearsay statements of child declarant alleging rape by his stepfather provided sufficient corroboration of stepfather's confession despite child's subsequent testimony denying the truthfulness of his original allegations. *Johnson v. State*, 298 Ark. 617, 770 S.W.2d 128 (1989).

The test for determining the sufficiency of the corroborating evidence is whether, if the accomplice's testimony were eliminated from the case, the other evidence independently establishes the crime and tends to connect the accused with its commission. However, the corroborating evidence does not have to be sufficient to convict defendant of capital felony murder independently of the accomplice's testimony. *Sanders v. State*, 310 Ark. 510, 838 S.W.2d 359 (1992).

The corroborating evidence need not be sufficient standing alone to sustain the conviction, but must, independent from that of the accomplice, tend to a substantial degree to connect the defendant with the commission of the crime. *Gibson v.*

State, 41 Ark. App. 154, 852 S.W.2d 326 (1993).

The test is whether, if the testimony of the accomplice were completely eliminated from the case, the other evidence independently establishes the crime and tends to connect the accused with its commission. *Gibson v. State*, 41 Ark. App. 154, 852 S.W.2d 326 (1993).

Evidence that only raises a suspicion of guilt is insufficient to corroborate an accomplice's testimony. *Gibson v. State*, 41 Ark. App. 154, 852 S.W.2d 326 (1993).

Corroboration must be evidence of a substantive nature since it must be directed toward proving the connection of the accused with the crime and not directed toward corroborating the accomplice's testimony. *Meeks v. State*, 317 Ark. 411, 878 S.W.2d 403 (1994).

Gibson v. State, 41 Ark. App. 154, 852 S.W.2d 326 (1993). 490 U.S. 1026, 109 S. Ct. 1759, 104 L. Ed. 2d 195 (1989), cert. denied.

In a case involving the manufacture of a controlled substance, evidence held insufficient to satisfy the requirements of subdivision (e)(1) of this section where the evidence produced by the State, other than the testimony of the accomplice, did no more than place defendant in a location where marijuana was used and where the marijuana growing plot was discussed. *Gordon v. State*, 326 Ark. 90, 931 S.W.2d 91 (1996).

Evidence that defendant was present at a residence where a search warrant was executed and was found by police exiting a bedroom in which items used to manufacture methamphetamine were found and that the residence had the odor of a methamphetamine laboratory was not sufficient to support the co-defendant residence owner's testimony that defendant had been manufacturing methamphetamine at the residence; defendant's convictions of possession of methamphetamine and drug paraphernalia were reversed as evidence was otherwise insufficient to support the convictions. *Miles v. State*, 76 Ark. App. 255, 64 S.W.3d 759 (2001).

Test for determining the sufficiency of corroborating evidence is whether, if accomplice testimony were totally eliminated from the case, the other evidence independently establishes the crime and tends to connect the accused with its com-

mission. *Tate v. State*, 84 Ark. App. 184, 137 S.W.3d 404 (2003).

In an armed robbery and theft prosecution, testimony of the driver of the getaway car that directly linked defendant to the robbery, the corroborating testimony of a store employee that defendant took money from, and that of an officer that defendant fled from after the getaway car crashed, was sufficient to convict defendant under this section. *Parker v. State*, 355 Ark. 639, 144 S.W.3d 270 (2004).

—Not Shown.

The trial court erred in ruling, as a matter of law, that two witnesses who had been given immunity were accomplices of defendant and that he could not, therefore, be convicted on the basis of their testimony alone. *State v. Young*, 315 Ark. 656, 869 S.W.2d 691 (1994).

Confessions.

Confession made before a justice of the peace while holding court is a judicial confession and is sufficient. *Skaggs v. State*, 88 Ark. 62, 113 S.W. 346 (1908).

A confession, unless made in open court, cannot be used in evidence against a person charged with a crime unless it is first shown that the confession was freely and voluntarily made. *Claborn v. State*, 115 Ark. 387, 171 S.W. 862 (1914).

Where sheriff and prosecuting attorney testified as to admissions made by the defendant, which testimony was brought into the record without objection, it was proper testimony for the jury to consider. *Wadlington v. State*, 216 Ark. 914, 227 S.W.2d 940 (1950).

Subsection (d) has no application to a proceeding for revocation of a suspended sentence, and defendant's virtual confession would afford sufficient basis for the judgment revoking his suspension. *Selph v. State*, 264 Ark. 197, 570 S.W.2d 256 (1978).

Defendant's statement to his mother was a "confession," as that term is used in subsection (d) of this section. *Bishop v. State*, 294 Ark. 303, 742 S.W.2d 911 (1988).

This section implies that a confession in open court is sufficient to sustain conviction. *Davis v. State*, 33 Ark. App. 198, 804 S.W.2d 373 (1991).

Pre-arrest statement by defendant charged with DWI that he was the driver

of the vehicle was not a "confession" as that term is used in subsection (d), because defendant's statement contained no admission that defendant was intoxicated or that his blood alcohol level was in excess of the legal limit at the time of the accident; defendant's statement that he was the operator of the vehicle merely constituted an admission of one element of the offense of DWI, rather than a confession of the crime. *Stephens v. State*, 320 Ark. 426, 898 S.W.2d 435 (1995).

Evidence was sufficient for a conviction of arson where defendant stated that the victim's body was placed on a wood burning stove where investigator's stated the fire had started, defendant admitted that he had kicked the pipe off of the stove, and the value of the destroyed trailer and its contents was between \$20,000 and \$25,000. *Johnson v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 517 (Sept. 23, 2004).

Evidence was sufficient for conviction of first-degree murder where the victim was last seen in the company of defendant, defendant confessed to his fellow inmates that he killed the victim with his hands in a fight after an argument, defendant told his brother that he would like to kill the victim, the victim's body was placed on wood burning stove, defendant kicked the pipe off of the stove, and the victim's body was found charred. *Johnson v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 517 (Sept. 23, 2004).

—In General.

The requirement of subsection (d) for other proof requires the State to prove (1) the existence of an injury or harm constituting a crime and (2) that the injury or harm was caused by someone's criminal activity. *Barnes v. State*, 346 Ark. 91, 55 S.W.3d 271 (2001).

—Additional Evidence.

The confession of the defendant, accompanied with the proof that the offense was actually committed by someone, will warrant his conviction. *Melton v. State*, 43 Ark. 367 (1884); *Smith v. State*, 168 Ark. 253, 269 S.W. 995 (1925); *Haraway v. State*, 203 Ark. 912, 159 S.W.2d 733, cert. denied, 317 U.S. 648, 63 S. Ct. 42, 87 L. Ed. 521 (1942); *Mouser v. State*, 215 Ark. 131, 219 S.W.2d 611 (1949); *Hargett v. State*, 235 Ark. 189, 357 S.W.2d 533

(1962); *Wallis v. State*, 245 Ark. 1024, 436 S.W.2d 273 (1969); *Fitzhugh v. State*, 293 Ark. 315, 737 S.W.2d 638 (1987); *Grimes v. State*, 295 Ark. 426, 748 S.W.2d 657 (1988).

Additional evidence held sufficient to show that the offense was committed. *Finn v. State*, 127 Ark. 204, 191 S.W. 899 (1917); *Johnson v. State*, 135 Ark. 377, 205 S.W. 646 (1918); *Haraway v. State*, 203 Ark. 912, 159 S.W.2d 733, cert. denied, 317 U.S. 648, 63 S. Ct. 42, 87 L. Ed. 521 (1942); *Mouser v. State*, 215 Ark. 131, 219 S.W.2d 611 (1949); *Ezell v. State*, 217 Ark. 94, 229 S.W.2d 32 (1950); *Forester v. State*, 224 Ark. 194, 272 S.W.2d 320 (1954); *Moore v. State*, 227 Ark. 544, 299 S.W.2d 838 (1958), cert. denied, 358 U.S. 946, 79 S. Ct. 356, 3 L. Ed. 2d 353 (1959); *Boone v. State*, 230 Ark. 821, 327 S.W.2d 87 (1959); *Stewart v. State*, 237 Ark. 748, 375 S.W.2d 804, cert. denied, 379 U.S. 935, 85 S. Ct. 336, 13 L. Ed. 2d 345 (1964); *Paschal v. State*, 243 Ark. 329, 420 S.W.2d 73 (1967); *Mosley v. State*, 246 Ark. 358, 438 S.W.2d 311 (1969); *Nash v. State*, 248 Ark. 323, 451 S.W.2d 869 (1970); *Mosby v. State*, 253 Ark. 904, 489 S.W.2d 799 (1973); *Upton v. State*, 257 Ark. 424, 516 S.W.2d 904 (1974); *Neal v. State*, 259 Ark. 27, 531 S.W.2d 17 (1975), vacated in part, 429 U.S. 808, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976); *Whitmore v. State*, 263 Ark. 419, 565 S.W.2d 133 (1978); *Jamison v. State*, 272 Ark. 24, 611 S.W.2d 753 (1981); *Derring v. State*, 273 Ark. 347, 619 S.W.2d 644 (1981); *Thomerson v. State*, 274 Ark. 17, 621 S.W.2d 690 (1981); *McQueen v. State*, 283 Ark. 232, 675 S.W.2d 358 (1984); *Jacobs v. State*, 294 Ark. 551, 744 S.W.2d 728 (1988); *Hart v. State*, 301 Ark. 200, 783 S.W.2d 40 (1990); *Spears v. State*, 321 Ark. 504, 905 S.W.2d 828 (1995).

Additional evidence held insufficient to show that the offense was committed. *Hickerson v. State*, 196 Ark. 497, 118 S.W.2d 671 (1938); *Johnson v. State*, 198 Ark. 871, 131 S.W.2d 934 (1939); *Eaton v. State*, 255 Ark. 45, 498 S.W.2d 648 (1973); *Boden v. State*, 270 Ark. 614, 605 S.W.2d 429 (1980); *Bray v. State*, 12 Ark. App. 53, 670 S.W.2d 822 (1984); *Trotter v. State*, 290 Ark. 269, 719 S.W.2d 268 (1986); *Thomas v. State*, 295 Ark. 29, 746 S.W.2d 49 (1988).

The "other evidence" and the "circumstances" required in addition to a confession to warrant conviction must be of a

substantial character which, independent of the confession, and considered without reference to what the accused is alleged to have said or written, would suffice to overcome the legal presumption that casualty was an accident, or that it resulted from natural events. *Johnson v. State*, 198 Ark. 871, 131 S.W.2d 934 (1939).

The test of the correctness of verdict is not whether there was sufficient evidence to sustain a conviction, but whether there was evidence that such an offense was committed, so that, before the confession could be introduced against the defendant, there must be evidence that the crime was committed by someone. *Charles v. State*, 198 Ark. 1154, 133 S.W.2d 26 (1939); *Bivens v. State*, 242 Ark. 362, 413 S.W.2d 653 (1967); *Sawyer v. State*, 284 Ark. 26, 678 S.W.2d 367 (1984).

Corroborating evidence that offense was committed need not be sufficient to sustain a conviction. *Morgan v. State*, 286 Ark. 264, 691 S.W.2d 164 (1985); *Bryant v. State*, 16 Ark. App. 45, 696 S.W.2d 773 (1985).

Defendant's alleged statement merely constituted an admission of one element of the offense charged and not a confession; a statement amounts to a confession only if there is an admission of guilt as to the commission of a criminal act. Thus, the defendant's statement did not require corroboration in order to support the defendant's conviction. *Snyder v. City of DeWitt*, 15 Ark. App. 277, 692 S.W.2d 273 (1985).

To satisfy this section and corroborate the confession, the state only had to prove that the crime was committed by someone. *Trotter v. State*, 290 Ark. 269, 719 S.W.2d 268 (1986); *Grimes v. State*, 295 Ark. 426, 748 S.W.2d 657 (1988); *Rucker v. State*, 320 Ark. 643, 899 S.W.2d 447 (1995).

In corroborating defendant's confession state did not have to connect defendant to the offense by independent evidence; there must only be "other proof" that the offense occurred, in other words, proof of the corpus delicti. *Hart v. State*, 301 Ark. 200, 783 S.W.2d 40 (1990).

State must prove, independent of a defendant's confession, that two elements exist: (1) an injury or harm constituting the crime, and (2) that the injury or harm was caused by someone's criminal activity.

Hart v. State, 301 Ark. 200, 783 S.W.2d 40 (1990).

The primary reason the state must prove the corpus delicti in corroborating a defendant's confession is to insure that a person is not convicted of a crime that did not occur. Hart v. State, 301 Ark. 200, 783 S.W.2d 40 (1990).

Where defendant confessed to police that he raped victim on two occasions and at trial there was no substantive proof of a second rape, it was error not to grant defendant's motion for acquittal as to one count of rape. Yates v. State, 301 Ark. 424, 785 S.W.2d 199 (1990).

In prosecution for rape of his stepdaughter, where defendant admitted to having oral intercourse with the child, corroboration requirement was met by testimony of defendant's wife as to what child had told her regarding the alleged incidents. Hinzman v. State, 53 Ark. App. 256, 922 S.W.2d 725 (1996).

Statement containing knowledge of crime not known by the general public accompanied by witness' overhearing a direct confession was sufficient to sustain conviction for capital murder. Echols v. State, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied, 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997).

The testimony demonstrating that defendant did in fact steal the pastries provided ample corroborating evidence of his intent. Releford v. State, 59 Ark. App. 136, 954 S.W.2d 295 (1997).

In a prosecution for rape of a five year old, the defendant's confession was sufficiently corroborated by other evidence where the physician who examined the victim on the day after the incident testified that he found bruises over the lower part of the body, that the bruises were on the buttocks, thighs, and groin area, and that there was a bruise on the right labia majora of the vaginal area, which could be consistent with sexual abuse. Lewis v. State, 74 Ark. App. 61, 48 S.W.3d 535 (2001).

Under the corpus delicti rule, the state had to prove the existence of an injury or harm constituting a crime and that the injury or harm was caused by someone's criminal activity; the victim's body and the physical evidence found at the scene establish the crime of murder and were sufficient to satisfy the rule. Jenkins v. State, 348 Ark. 686, 75 S.W.3d 180 (2002).

Corpus Delicti Rule.

The corpus delicti rule requires the State to prove, independent of a confession, two elements: (1) an injury or harm constituting a crime; and (2) that the injury or harm was caused by someone's criminal activity. Ferrell v. State, 325 Ark. 455, 929 S.W.2d 697 (1996).

Where defendant: 1) led police officers to a remote wooded area where the decomposed remains of the body of one victim were found, and while the body of the other victim was never found, defendant inquired of police if it had been found and pleaded with them to continue looking for it so the victim could have a proper burial; 2) asked officers if he could be charged with murder if they could not find any bodies; and 3) made other incriminating statements, there was strong circumstantial evidence of both the fact of the victims' deaths and defendant's responsibility for the deaths to prove corpus delicti. Ware v. State, 348 Ark. 181, 75 S.W.3d 165 (2002).

—Instructions.

An instruction in a criminal case that the jury might convict the defendant if they were satisfied, beyond a reasonable doubt, by his confession not made in open court that he was guilty of the crime charged, was erroneous. Hubbard v. State, 77 Ark. 126, 91 S.W. 11 (1905).

In a criminal prosecution, a confession not made in open court will not warrant a conviction unless there is other proof tending to show that the offense had been committed, and an instruction to that effect is essential when, from statements attributed to the defendant alone, a specific intent to commit crime might be inferred by the jury. Davis v. State, 115 Ark. 566, 173 S.W. 829 (1914).

Confrontation Rights.

—Incentives to Testify.

Evidence of guarantees of immunity or promises of leniency or other considerations given to a prospective witness are proper subjects of cross-examination, and the denial of that right may violate constitutional guarantees of confrontation. Sullivan v. State, 32 Ark. App. 124, 798 S.W.2d 110 (1990).

The fact that it might have been error to deny the right to cross-examine on evidence of guarantees of immunity or promises of leniency or other considerations

given to a prospective witness does not necessarily mandate reversal. The denial of the right of cross-examination on such issues, like any other trial error, is subject to being found harmless under the circumstances of the particular case. *Sullivan v. State*, 32 Ark. App. 124, 798 S.W.2d 110 (1990).

Instructions.

Instructions on accomplice testimony held proper. *Celender v. State*, 86 Ark. 23, 109 S.W. 1024 (1908); *Casteel v. State*, 151 Ark. 69, 235 S.W. 386 (1921); *Stout v. State*, 164 Ark. 553, 262 S.W. 641 (1924); *Barnhardt v. State*, 169 Ark. 567, 275 S.W. 909 (1925); *Bryan v. State*, 179 Ark. 216, 15 S.W.2d 312 (1929); *Bennett v. State*, 201 Ark. 237, 144 S.W.2d 476 (1940); *Pope v. State*, 216 Ark. 314, 225 S.W.2d 8 (1949).

For discussion of defendant's responsibility to request instruction, see: *Miller v. State*, 155 Ark. 68, 243 S.W. 1063 (1922); *Slinkard v. State*, 193 Ark. 765, 103 S.W.2d 50 (1937); *Morris v. State*, 197 Ark. 778, 126 S.W.2d 93 (1939); *Carnal v. State*, 234 Ark. 1050, 356 S.W.2d 651, cert. denied, 371 U.S. 876, 83 S. Ct. 146, 9 L. Ed. 2d 114 (1962); *Garrison v. State*, 13 Ark. App. 245, 682 S.W.2d 772 (1985).

Instructions on accomplice testimony held improper. *Cummins v. State*, 163 Ark. 24, 258 S.W. 622 (1924); *Sweatt v. State*, 251 Ark. 650, 473 S.W.2d 913 (1971).

For cases discussing defendant's entitlement to particular instructions, see: *Jackson v. State*, 193 Ark. 776, 102 S.W.2d 546 (1937); *Boyd v. State*, 215 Ark. 156, 219 S.W.2d 623 (1949); *McCabe v. State*, 245 Ark. 769, 434 S.W.2d 277 (1968); *Hilliard v. State*, 259 Ark. 81, 531 S.W.2d 463 (1976); *Norton v. State*, 260 Ark. 412, 540 S.W.2d 588 (1977); *Tyler v. State*, 265 Ark. 822, 581 S.W.2d 328 (1979).

Proper instructions given at close of trial erased any possible error or prejudice resulting from use of certain words during the trial. *Knight v. State*, 228 Ark. 502, 308 S.W.2d 821 (1958).

An instruction that may have left the question as to whether a witness was an accomplice to be decided by the jury was not reversible error. *Rice v. State*, 241 Ark. 570, 408 S.W.2d 902 (1966).

Where there is a fact question concerning whether parties were accomplices, it is

proper for the court to instruct the jury that they are to determine whether a certain person was an accomplice rather than instructing them that such person was an accomplice. *DuBois v. State*, 258 Ark. 459, 527 S.W.2d 595 (1975).

Where the state presented ample evidence tending to connect the petitioner to the crime, the lack of an accomplice instruction did not prejudice the petitioner. *O'Rourke v. State*, 298 Ark. 144, 765 S.W.2d 916 (1989).

—Jury Question.

The sufficiency of the corroborating evidence will frequently be a question of fact, for the jury, rather than a question of law for the court. Where the circumstantial evidence tending to connect the defendant with the offense is substantial, the question of its sufficiency, along with the testimony of the accomplice, becomes one for the jury. *Maynard v. State*, 21 Ark. App. 20, 727 S.W.2d 858 (1987).

Even though one circumstance or a combination of several circumstances might not be sufficient, all of the circumstances in evidence may constitute a chain sufficient to present a jury question as to their adequacy as corroboration of the accomplice. *Maynard v. State*, 21 Ark. App. 20, 727 S.W.2d 858 (1987).

—Misdemeanors.

The sale of intoxicating liquors on Sunday is a misdemeanor, which may be proven by the uncorroborated testimony of one witness. *Richardson v. State*, 211 Ark. 1019, 204 S.W.2d 477 (1947).

Post-Conviction Relief.

In an appeal from a denial for post-conviction relief, the appellate court could consider not only the testimony from the ARCrP Rule 37 hearing, but also the testimony given and evidence received at trial and abstracted in defendant's brief because the entire trial transcript was admitted as an exhibit at the Rule 37 hearing. *Vickers v. State*, 320 Ark. 437, 898 S.W.2d 26 (1995).

Rebuttal or Reopening.

Witness may be allowed to restate his testimony after submission of the case. *Bennifield v. State*, 62 Ark. 365, 35 S.W. 790 (1896), overruled on other grounds, *McDonald v. State*, 37 Ark. App. 61, 824 S.W.2d 396 (1992); *Tallman v. State*, 151 Ark. 108, 235 S.W. 389 (1921).

State may be permitted to introduce evidence after the defendant has rested. *Walker v. State*, 100 Ark. 180, 139 S.W. 1139 (1911); *Polk v. State*, 252 Ark. 320, 478 S.W.2d 738 (1972).

Trial court has discretion to allow the introduction of testimony in rebuttal which more properly should be introduced in chief. *Bobo v. State*, 179 Ark. 207, 14 S.W.2d 1115 (1929).

Rebuttal evidence held improper. *Henson v. State*, 239 Ark. 727, 393 S.W.2d 856 (1965).

Subsection (c) permits the court to allow the state to reopen its case and offer new evidence. *Lacy v. State*, 240 Ark. 84, 398 S.W.2d 508 (1966).

It is within the trial court's discretion to permit the state to present other witnesses after the state has rested, where the circumstances are such as not to prejudice the defendant through surprise or otherwise at a time when the disadvantage cannot be overcome. *Wimberly v. State*, 240 Ark. 345, 399 S.W.2d 274 (1966); *Rochester v. State*, 250 Ark. 758, 467 S.W.2d 182 (1971).

The court did not err in permitting the state to bolster its case in chief by use of rebuttal. *Pointer v. State*, 248 Ark. 710, 454 S.W.2d 91, cert. denied, 400 U.S. 959, 91 S. Ct. 359, 27 L. Ed. 2d 268 (1970).

State properly allowed to introduce new evidence after resting case. *Bland v. State*, 251 Ark. 23, 470 S.W.2d 592 (1971); *McClendon v. State*, 254 Ark. 902, 496 S.W.2d 428 (1973).

Defendant's testimony can be impeached by rebuttal evidence. *Swindler v. State*, 267 Ark. 418, 592 S.W.2d 91 (1979), cert. denied, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1980); *Walls v. State*, 280 Ark. 291, 658 S.W.2d 362 (1983).

It is generally in the sound discretion of the trial court to allow rebuttal testimony which might have been properly introduced in the state's case-in-chief. In prosecution of a homicide, the trial court abused its discretion in permitting the introduction of a witness' testimony concerning the homicide that properly belonged in the state's case-in-chief, where the prosecutors actually interviewed the witness before they had finished calling their witnesses. *Sims v. State*, 19 Ark. App. 45, 716 S.W.2d 774 (1986).

State's Evidence.

Refusal of the trial court to require state

to offer proof in a murder prosecution before the defendant stated his case to the jury was not error. *McDaniels v. State*, 187 Ark. 1163, 63 S.W.2d 335 (1933).

Cited: *Harshaw v. State*, 94 Ark. 343, 127 S.W. 745 (1910); *Iverson v. State*, 99 Ark. 453, 138 S.W. 958 (1911); *Greenwood v. State*, 107 Ark. 568, 156 S.W. 427 (1913); *Hall v. State*, 125 Ark. 263, 188 S.W. 801 (1916); *Tongs v. State*, 130 Ark. 344, 197 S.W. 573 (1917); *Griffin v. State*, 172 Ark. 606, 289 S.W. 765 (1927); *Robinson v. State*, 177 Ark. 534, 7 S.W.2d 5 (1928); *Bell v. State*, 177 Ark. 1034, 9 S.W.2d 238 (1928); *Cush v. State*, 180 Ark. 448, 21 S.W.2d 616 (1929); *Howell v. State*, 220 Ark. 278, 247 S.W.2d 952 (1952); *Smith v. State*, 222 Ark. 650, 262 S.W.2d 272 (1953); *Kasinger v. State*, 234 Ark. 788, 354 S.W.2d 718 (1962); *Pointer v. State*, 248 Ark. 710, 454 S.W.2d 91 (1970); *Moore v. State*, 251 Ark. 436, 472 S.W.2d 940 (1971); *Reynolds v. State*, 254 Ark. 1007, 497 S.W.2d 275 (1973); *Murphy v. State*, 255 Ark. 90, 498 S.W.2d 884 (1973); *Decker v. State*, 255 Ark. 138, 499 S.W.2d 612 (1973); *Ferguson v. State*, 255 Ark. 917, 503 S.W.2d 907 (1974); *Upton v. State*, 257 Ark. 424, 516 S.W.2d 904 (1974); *Sanders v. State*, 259 Ark. 329, 532 S.W.2d 752 (1976); *Pennington v. Housewright*, 666 F.2d 329 (8th Cir. 1981); *Gipson v. Lockhart*, 692 F.2d 66 (8th Cir. 1982); *Harris v. Housewright*, 697 F.2d 202 (8th Cir. 1982); *Kellensworth v. State*, 275 Ark. 252, 631 S.W.2d 1 (1982); *Hunter v. State*, 8 Ark. App. 283, 653 S.W.2d 159 (1983); *Hill v. State*, 285 Ark. 77, 685 S.W.2d 495 (1985); *Smith v. State*, 286 Ark. 247, 691 S.W.2d 154 (1985); *Birchett v. State*, 289 Ark. 16, 708 S.W.2d 625 (1986); *Parette v. State*, 301 Ark. 607, 786 S.W.2d 817 (1990); *Clements v. State*, 303 Ark. 319, 796 S.W.2d 839 (1990); *Leshe v. State*, 304 Ark. 442, 803 S.W.2d 522 (1991); *Andrews v. State*, 305 Ark. 262, 807 S.W.2d 917 (1991); *Smith v. State*, 310 Ark. 247, 837 S.W.2d 279 (1992); *Jackson v. Lockhart*, 992 F.2d 167 (8th Cir. 1993); *Franklin v. State*, 318 Ark. 99, 884 S.W.2d 246 (1994); *Campbell v. State*, 319 Ark. 332, 891 S.W.2d 55 (1995); *Mills v. State*, 322 Ark. 647, 910 S.W.2d 682 (1995); *Martin v. Norris*, 82 F.3d 211 (8th Cir. 1996); *Tinsley v. State*, 338 Ark. 342, 993 S.W.2d 898 (1999); *Windsor v. State*, 338 Ark. 649, 1 S.W.3d 20 (1999); *Barnett v. State*, 346 Ark. 11, 53 S.W.3d 527 (2001); *United*

States v. Kehoe, 310 F.3d 579 (8th Cir. 2002), cert. denied, 538 U.S. 1048, 123 S. Ct. 2112, 155 L. Ed. 2d 1089 (2003).

16-89-112. Evidence — Proof of certain acts or facts.

(a) In trials for treason, no evidence shall be given of an overt act that is not expressly laid in the indictment, and no conviction shall be had unless one (1) or more overt acts are alleged therein.

(b) In trials of indictments for conspiracy, in cases where an overt act is required by law to consummate the offense, no conviction shall be had unless one (1) or more overt acts are expressly alleged in the indictment and proved on the trial. However, overt acts other than those alleged in the indictment may be given in evidence on the part of the prosecution.

(c)(1) If the existence, constitution, or powers of any banking company shall become material or are in any manner drawn in question on the trial of any indictment or other proceeding in a criminal cause, it shall not be necessary to produce a certified copy of the charter or act of incorporation, but the existence, constitution, or powers may be proved by general reputation or by the printed statute book of the state by which the corporation was created.

(2) On the trial of any indictment for counterfeiting any bill or note of any bank in this state, or of the United States, or of any other state or territory of the United States, the prosecuting attorney shall not be required to produce, on the trial, an authenticated copy of the charter of the bank, but the charter may be established in the manner prescribed in subdivision (c)(1) of this section.

History. Rev. Stat., ch. 45, §§ 161, 162, 164, 165; C. & M. Dig., §§ 3117-3120; Pope's Dig., §§ 3951-3954; A.S.A. 1947, §§ 43-2012 — 43-2015.

CASE NOTES

ANALYSIS

Applicability.

Proof by reputation.

Proof required.

—Insufficient proof.

—Sufficient proof.

Applicability.

This section applies to all cases involving allegations of criminal conspiracy. *Guinn v. State*, 23 Ark. App. 5, 740 S.W.2d 148 (1987).

Proof by Reputation.

In a prosecution for stealing the books of a banking corporation with intent to defraud, it is sufficient to prove that there was such a corporation de facto, which may be proved by general reputation. *Mears v. State*, 84 Ark. 136, 104 S.W. 1095 (1907).

Where the ownership of property alleged to have been stolen was charged to be in a certain railroad company, "a corporation," it was only necessary for the state to prove the de facto existence of the corporation, and evidence of general reputation of corporate existence was sufficient. *Pearrow v. State*, 146 Ark. 182, 225 S.W. 311 (1920).

Proof Required.

Under this section, it is required that state both allege and prove specific overt act evidencing that conspiracy has been put in motion, and provided issue is properly raised, failure to both allege and prove such an act is fatal to a conviction. *Guinn v. State*, 23 Ark. App. 5, 740 S.W.2d 148 (1987).

—Insufficient Proof.

"Open file" policy did not meet require-

ments of this section, and such failure warranted new trial. *Guinn v. State*, 23 Ark. App. 5, 740 S.W.2d 148 (1987).

—**Sufficient Proof.**

Evidence held sufficient to support con-

viction. *Shamlin v. State*, 23 Ark. App. 39, 743 S.W.2d 1, cert. denied, 488 U.S. 863, 109 S. Ct. 163, 102 L. Ed. 2d 133 (1988).

Cited: *Lee v. State*, 27 Ark. App. 198, 770 S.W.2d 148 (1989).

16-89-113. Evidence — Acquittal upon certain insufficient evidence.

(a) In all cases where, by law, two (2) witnesses, or one (1) witness with corroborating circumstances are requisite to warrant a conviction, the court shall instruct the jury to render a verdict of acquittal if the requisition is not fulfilled, by which instruction they are bound.

(b)(1) Where two (2) or more persons are included in the same indictment, and the court is of the opinion that the evidence in regard to a particular individual is not sufficient to put him or her on his or her defense, it must, on motion of either party desiring to use the defendant as a witness, order him or her to be discharged from the indictment and permit him or her to be examined by the party so moving.

(2) The order is an acquittal of the defendant and a bar to another prosecution for the same offense.

History. *Crim. Code*, §§ 233, 241; *C. & M. Dig.*, §§ 3062, 3180; *Pope's Dig.*, §§ 3888, 4016; *A.S.A.* 1947, §§ 43-2117, 43-2118.

CASE NOTES

ANALYSIS

Discretion of court.

Motion for directed verdict.

Discretion of Court.

Where two defendants are jointly charged, one moves to discharge the codefendant, and the codefendant pleads innocent, trial court must have wide discretion in considering the motion, and the court's ruling will not be overturned in absence of abuse of discretion. *Ballew v. State*, 246 Ark. 1191, 441 S.W.2d 453 (1969).

Motion for Directed Verdict.

Appellant's contention as to insufficiency of evidence for want of corroboration of his extrajudicial "confession" might

properly have been raised by motion for a directed verdict and, while it has been held that the sufficiency of the evidence to sustain the verdict of a jury will be reviewed even in the absence of a request for a directed verdict, the failure to make the motion is some indication that appellant's counsel probably felt at that time there was sufficient corroborating evidence to make a question for the jury. *Bivens v. State*, 242 Ark. 362, 413 S.W.2d 653 (1967).

Evidence insufficient to warrant a directed verdict or reduced charge. *Swindler v. State*, 267 Ark. 418, 592 S.W.2d 91 (1979), cert. denied, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1980).

16-89-114. Documents — Production generally.

Upon motion of either party, the court by its order and process may compel the production of any written document or any other thing which may be necessary or proper to be produced or exhibited as evidence on trial and may punish a disobedience of its orders or process as in case of witnesses refusing to testify.

History. Crim. Code, § 153; C. & M. Dig., § 3111; Pope's Dig., § 3945; A.S.A. 1947, § 43-2010.

Cross References. Prosecutor's obligation to disclose, ARCrP 17.1.

RESEARCH REFERENCES

Ark. L. Rev. Arkansas' 1971 Criminal Discovery Act, 26 Ark. L. Rev. 1.

CASE NOTES

ANALYSIS

Admissibility.
Self-incrimination.

Admissibility.

It was proper for the court to compel defendant in a murder trial to file a private ballistics report on the weapons involved as the report was clearly admissible in evidence if introduced by the maker thereof. *Walker v. State*, 241 Ark. 300, 408 S.W.2d 905 (1966), appeal dismissed and cert. denied, 386 U.S. 682, 87 S. Ct. 1325, 18 L. Ed. 2d 403, rehearing denied, 387

U.S. 926, 87 S. Ct. 2027, 18 L. Ed. 2d 987 (1967).

Self-Incrimination.

Where report of defendant's ballistics expert was given to prosecuting attorney, but was not made part of record and expert did not testify, there was no violation of defendant's constitutional privilege against self-incrimination, since the statements in the report contained nothing as coming from the defendant and the report was not introduced into evidence. *Walker v. Bishop*, 408 F.2d 1378 (8th Cir. 1969).

16-89-115. Documents — Production where in possession of state.

(a) In any criminal prosecution brought by the State of Arkansas, no statement or report in the possession of the state which was made by a state witness or prospective state witness, other than the defendant, to an agent of the state shall be subject to subpoena, discovery, or inspection until the witness has testified on direct examination in the trial of the case.

(b) After a witness called by the state has testified on direct examination, the court on motion of the defendant shall order the state to produce any statement, as defined in subsection (e) of this section, of the witness in the possession of the state which relates to the subject matter as to which the witness has testified. If the entire contents of the statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his or her examination and use.

(c)(1) If the state claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the state to deliver the statement for the inspection of the court in camera.

(2) Upon the delivery, the court shall excise the portions of the statement which do not relate to the subject matter of the testimony of the witness.

(3) With the material excised, the court shall then direct delivery of the statement to the defendant for his or her use.

(4) If, pursuant to the procedure, any portion of the statement is withheld from the defendant and the defendant objects to the withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of the statement shall be preserved by the state and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge.

(5) Whenever any statement is delivered to a defendant pursuant to this section, the court, in its discretion and upon application of the defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of the statement by the defendant and his or her preparation for its use in the trial.

(d) If the state elects not to comply with an order of the court under subsection (b) or (c) of this section to deliver to the defendant any statement, or portion thereof, as the court may direct, the court shall strike from the record the testimony of the witness and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in this section in relation to any witness called by the state, means:

(1) A written statement made by the witness and signed or otherwise adopted or approved by him or her; or

(2) A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by the witness to an agent of the state and recorded contemporaneously with the making of the oral statement.

(f) The provisions of this section shall be applicable to the district, city, and circuit courts of this state.

History. Acts 1971, No. 381, §§ 3, 4; A.S.A. 1947, §§ 43-2011.3, 43-2011.4; Acts 2003, No. 1185, § 211; 2003, No. 1185, §§ 211, 212.

Amendments. The 2003 amendment

by No. 1185, § 211, substituted "the district, city" for "municipal" in (f).

The 2003 amendment by No. 1185, § 212, substituted "the district, city" for "municipal, police" in (f).

CASE NOTES

ANALYSIS

Appeals.

Harmless error.

Prior statement.

Time of producing statement.

Witnesses not called.

Work product.

Appeals.

Evidence insufficient to find that the trial court erred in not requiring the prosecutor to provide defendant with previous statements made by a police officer who testified for the state. *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987).

Violation of this section was harmless where, although the trial court erred in refusing to order the state to produce copies of the statements for defendant, the trial court allowed the defendant's counsel to examine the statements and gain the full knowledge of their contents; thus reversal was not required. *Winfrey v. State*, 293 Ark. 342, 738 S.W.2d 391 (1987).

Evidence was sufficient to find that error was not harmless beyond a reasonable doubt where the trial court ruled that the defendant's attorney could not use the prior inconsistent statements of the victims for impeachment, and thus convic-

tions had to be reversed and remanded for violations of the defendant's rights under the confrontation clause of U.S. Const. Amend. 6. *Winfrey v. State*, 293 Ark. 342, 738 S.W.2d 391 (1987).

Failure of law enforcement officer to maintain his handwritten notes of eyewitness statements regarding the incident did not warrant mistrial. *Wood v. State*, 20 Ark. App. 61, 724 S.W.2d 183 (1987).

Although a witness's statement relating to pretrial identification would be subject to inspection upon the defendant's motion after that witness had testified at trial under this section, where defendant made a pretrial motion to exclude the witness's testimony on the ground that he had not been informed through discovery that the witness had identified him in a lineup, the information requested by the defendant was not subject to discovery until after the witness testified; therefore, the trial court did not err in denying the motion to exclude the witness's in-court identification. *Shuffield v. State*, 23 Ark. App. 167, 745 S.W.2d 630 (1988).

Harmless error.

Failure, if any, to comply with this section held harmless. *Hill v. State*, 331 Ark. 312, 962 S.W.2d 762 (1998), cert. denied, 525 U.S. 860, 119 S. Ct. 145, 142 L. Ed. 2d 118 (1998).

Prior Statement.

Where the prosecution was unable to produce a previous statement given to the prosecution by the prosecuting witness, it was error for the trial court to require defense attorney to proceed with his cross-examination of the witness without the statement, but such error was held harmless. *Rush v. State*, 252 Ark. 814, 481 S.W.2d 696 (1972).

In a case involving the over-possession of pseudoephedrine, the trial court did not err by failing to strike the testimony of a

witness based on an alleged failure to provide defendant with her written statement to police because it was unclear from the record if a written statement ever existed; moreover, even if it did exist, defendant's objection after the state rested was untimely. *Lytle v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 450 (June 8, 2005).

Time of Producing Statement.

Neither ARCrP 17.1(a) nor this section requires the prosecutor to produce written statements from a witness before the trial. *Brown v. State*, 315 Ark. 466, 869 S.W.2d 9 (1994).

Witnesses Not Called.

Where the witness was not called by the state there was no obligation to supply his statement, unless it contained information which negates the defendant's guilt. *Snell v. State*, 290 Ark. 503, 721 S.W.2d 628 (1986), cert. denied, 484 U.S. 872, 108 S. Ct. 202, 98 L. Ed. 2d 153 (1987).

Work Product.

There simply is no "work product" exception for the production of witnesses' statements in subsections (b) and (e). *Winfrey v. State*, 293 Ark. 342, 738 S.W.2d 391 (1987).

Among the factors to be taken into account in deciding whether a statement is substantially verbatim (not precisely verbatim) are the extent to which it conforms to the language of the witness, the length of the written statement in comparison to the length of the interview, whether quotations may be out of context, and the lapse of time between the interview and the transcription, which need be only contemporaneously, not simultaneously made. *Winfrey v. State*, 293 Ark. 342, 738 S.W.2d 391 (1987).

Cited: *Snell v. Lockhart*, 791 F. Supp. 1367 (E.D. Ark. 1992), aff'd in part and rev'd in part, 14 F.3d 1289 (8th Cir.), cert. denied, 513 U.S. 960, 115 S. Ct. 419, 130 L. Ed. 2d 334 (1994).

16-89-116. Documents — Discovery and inspection.

(a) Upon motion of a defendant, the court may order the prosecuting attorney to permit the defendant to inspect and copy or photograph any relevant:

(1) Written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody, or control of

the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney;

(2) Results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody, or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney; and

(3) Recorded testimony of the defendant before a grand jury.

(b) Upon motion of a defendant, the court may order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings, or places, or copies or portions thereof, which are within the possession, custody, or control of the state, upon a showing of materiality to the preparation of his or her defense and that the request is reasonable. Except as provided in subdivision (a)(2) of this section, this section does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by state agents in connection with the investigation or prosecution of the case, or of statements made by state witnesses or prospective state witnesses, other than the defendant, to agents of the state except as provided in § 16-89-115(a)-(e).

(c) If the court grants relief sought by the defendant under subdivision (a)(2) or subsection (b) of this section, it may, upon motion of the state, condition its order by requiring that the defendant permit the state to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his or her possession, custody, or control, upon a showing of materiality to the preparation of the state's case and that the request is reasonable. Except as to scientific or medical reports, this subsection does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant or his attorneys or agents in connection with the investigation or defense of the case or of statements made by the defendant or by state or defense witnesses, or by prospective state or defense witnesses, to the defendant, his agents, or attorneys.

(d) An order of the court granting relief under this section shall specify the time, place, and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(e)(1) Upon a sufficient showing, the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate.

(2) Upon motion by the state, the court may permit the state to make the showing, in whole or in part, in the form of a written statement to be inspected by the court in camera.

(3) If the court enters an order granting relief following a showing in camera the entire text of the state's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

(f) A motion under this section may be made only within ten (10) days after arraignment or at such reasonable later time as the court may permit.

(1) The motion shall include all relief sought under this section.

(2) A subsequent motion may be made only upon a showing of cause why the motion would be in the interest of justice.

(g)(1) If, subsequent to compliance with an order issued pursuant to this section, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under this section, he or she shall promptly notify the other party or his or her attorney or the court of the existence of the additional material.

(2) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this section or with an order issued pursuant to this section, the court may order the party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

(h) The provisions of this section shall be applicable to the district, city, and circuit courts of this state.

History. Acts 1971, No. 381, §§ 2, 4; The 2003 amendment by No. 1185, A.S.A. 1947, §§ 43-2011.2, 43-2011.4; Acts § 214, substituted “the district, city” for 2003, No. 1185, §§ 213, 214. “municipal, police” in (h).

Amendments. The 2003 amendment by No. 1185, § 213, substituted “the district, city” for “municipal” in (h).

16-89-117. Limitation of witness fees in misdemeanor trials.

In no trial of any misdemeanor in circuit court shall the fees of more than five (5) witnesses be taxed against any county or the state unless their materiality and importance are first affirmed and certified to, under oath, by the attorney at whose instance the additional witnesses are subpoenaed.

History. Acts 1915, No. 240, § 1; C. & M. Dig., § 2920; Pope’s Dig., § 3736; A.S.A. 1947, § 43-607.

16-89-118. Conduct of jury.

(a)(1) In the discretion of the court, the jurors may be permitted to separate or be kept together in the charge of proper officers before the case is submitted to them. The officers must be sworn to keep the jury together during the adjournment of the court and to suffer no person to speak to or communicate with them on any subject connected with the trial, nor to do so themselves.

(2) Whether permitted to separate or kept in the charge of officers, the jury must be admonished by the court that it is their duty not to

permit anyone to speak to or communicate with them on any subject connected with the trial and that all attempts to do so should be immediately reported by them to the court, and that they should not converse among themselves on any subject connected with the trial or form or express any opinion thereon until the cause is finally submitted to them. This admonition must be given or referred to by the court at each adjournment.

(b)(1) When, in the opinion of the court, it is necessary that the jury should view the place in which the offense is charged to have been committed or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers, to the place, which must be shown to them by the judge or by a person appointed by the court for that purpose.

(2) The officers must be sworn to suffer no person to speak or communicate with the jury on any subject connected with the trial, nor do so themselves, except for the mere showing of the place to be viewed, and to return them into court without unnecessary delay or at a specified time.

History. Crim. Code, §§ 235, 243, 244; Pope's Dig., §§ 4012, 4013, 4023, 4024; C. & M. Dig., §§ 3176, 3177, 3187, 3188; A.S.A. 1947, §§ 43-2119 — 43-2122.

CASE NOTES

ANALYSIS

Admonition.

Separation or sequestration.

— Discretion of court.

— Improper influence.

— Objection.

Swearing officers.

View of crime scene.

Admonition.

Where it is alleged that the jury has been exposed to improper influences, the state must show that such is not a fact, or that the exposure was of such a character that could not or did not influence them. *Vaughan v. State*, 57 Ark. 1, 20 S.W. 588 (1892); *McFalls v. State*, 66 Ark. 16, 48 S.W. 492 (1898); *Payne v. State*, 66 Ark. 545, 52 S.W. 276 (1899).

Failure of the court in the trial of a felony to admonish the jury before permitting them to separate is reversible error where it is not affirmatively shown that the jurors were exposed to no improper influence. *Johnson v. State*, 68 Ark. 401, 59 S.W. 34 (1900).

Admonition is sufficient, though addressed to the officer instead of the jury, where jurors were kept in the charge of that officer and had been properly admon-

ished at other adjournments. *Lee v. State*, 78 Ark. 77, 93 S.W. 754 (1906).

Where jury was permitted to separate for five-minute recess after admonition, but before submission of case to them, no error was committed in absence of showing of undue influence during the recess or of abuse of the court's discretion. *Scarber v. State*, 226 Ark. 503, 291 S.W.2d 241 (1956).

In a criminal prosecution, if a separation of the jury is after an adjournment, the state has the burden of showing that no juror has been subjected to the opportunity for influence to be exerted on him; whereas, if the separation follows a recess, it is incumbent upon defendant to make a showing of such influence. *Lancaster v. State*, 226 Ark. 820, 294 S.W.2d 348 (1956).

Evidence sufficient to show substantial compliance with the statutory duty to admonish the jury against communications as to the subjects being tried. *Payne v. State*, 226 Ark. 910, 295 S.W.2d 312 (1956), rev'd on other grounds, 356 U.S. 560, 78 S. Ct. 844, 2 L. Ed. 2d 975 (1958).

Objection to failure of a trial court to properly admonish the jurors against communications with others on any sub-

ject connected with the trial should be made at the time the objectionable instruction is given and not after the jurors have left the courtroom. *Payne v. State*, 226 Ark. 910, 295 S.W.2d 312 (1956), rev'd on other grounds, 356 U.S. 560, 78 S. Ct. 844, 2 L. Ed. 2d 975 (1958).

Evidence insufficient to show that conduct of two jurors, in asking the trial judge a question during a recess, was a violation of subdivision (a)(2). *Bryant v. State*, 254 Ark. 447, 494 S.W.2d 126 (1973).

Separation or Sequestration.

Separation held proper. *Hamilton v. State*, 62 Ark. 543, 36 S.W. 1054 (1896); *Borland v. State*, 158 Ark. 37, 249 S.W. 591 (1923); *Baxter v. State*, 225 Ark. 239, 281 S.W.2d 931 (1955); *Scarber v. State*, 226 Ark. 503, 291 S.W.2d 241 (1956); *Payne v. State*, 226 Ark. 910, 295 S.W.2d 312 (1956), rev'd on other grounds, 356 U.S. 560, 78 S. Ct. 844, 2 L. Ed. 2d 975 (1958); *Nail v. State*, 231 Ark. 70, 328 S.W.2d 836 (1959).

Court may keep jury together until meeting of court in adjourned term. *McVay v. State*, 104 Ark. 629, 150 S.W. 125 (1912).

Perfect impartiality in the jury is the object of subsection (a). *Capps v. State*, 109 Ark. 193, 159 S.W. 193 (1913).

Denial of motion to sequester jurors held proper. *Hutcherson v. State*, 262 Ark. 535, 558 S.W.2d 156 (1977); *Henderson v. State*, 279 Ark. 414, 652 S.W.2d 26, cert. denied, 464 U.S. 1012, 104 S. Ct. 536, 78 L. Ed. 2d 716 (1983).

—Discretion of Court.

It is within the sound discretion of the court to permit the jury to separate, either before or after the cause is submitted to them; but such discretion should be exercised with utmost caution. *Johnson v. State*, 32 Ark. 309 (1877).

Court did not abuse its discretion in placing nine jurymen in the charge of state police officer until other jurymen might be chosen, if the court gave the requisite instructions as to department of the jury, even though state police officer was not a resident of the county where the trial was being held. *Walker v. State*, 215 Ark. 530, 221 S.W.2d 402 (1949).

Prior to submission of case to jury, it was within court's discretion, under this

section, either to permit the jury to separate after proper admonition or to be kept together in charge of officer who was properly sworn. *Scarber v. State*, 226 Ark. 503, 291 S.W.2d 241 (1956); *Smith v. State*, 227 Ark. 332, 299 S.W.2d 52 (1957).

Decision of the trial judge to allow the jury a two-day recess was within the court's discretion where, after deliberating, the jury reported it had some difficulty with the verdict, and the trial judge needed to be outside the county for two days. *Harkness v. State*, 271 Ark. 424, 609 S.W.2d 35 (1980).

The decision of whether or not to sequester the jury is left to the discretion of the trial court and the trial court's decision will not be disturbed in the absence of a clear showing of prejudice. *Henderson v. State*, 279 Ark. 414, 652 S.W.2d 26, cert. denied, 464 U.S. 1012, 104 S. Ct. 536, 78 L. Ed. 2d 716 (1983).

—Improper Influence.

Where the trial court orders the jury in criminal cases to be kept together and they are exposed to improper influences, the burden is upon the state to show that they were not prejudicially influenced; but where the court permits the jury to separate, the burden is upon the accused to show that the jurors were improperly influenced by the exposure. *Maclin v. State*, 44 Ark. 115 (1884); *Reeves v. State*, 84 Ark. 569, 106 S.W. 945 (1907); *Armstrong v. State*, 102 Ark. 356, 144 S.W. 195 (1912); *Carlton v. State*, 109 Ark. 516, 161 S.W. 145 (1913); *Borland v. State*, 158 Ark. 37, 249 S.W. 591 (1923); *Wallace v. State*, 180 Ark. 627, 22 S.W.2d 395 (1929); *Bieard v. State*, 189 Ark. 217, 72 S.W.2d 530 (1934); *Newton v. State*, 189 Ark. 789, 75 S.W.2d 376 (1934); *Harkness v. State*, 271 Ark. 424, 609 S.W.2d 35 (1980).

Evidence insufficient to show improper influence. *Freels v. State*, 130 Ark. 189, 196 S.W. 913 (1917).

—Objection.

An objection to the separation of the jurors must be made in the trial court to make it subject for consideration by Supreme Court. *Lesieurs v. State*, 170 Ark. 560, 280 S.W. 9 (1926).

In cases where the court's action in exercising its discretion as to the separation of the jury is properly brought forward in the motion for a new trial, the

assignment cannot be considered on appeal, in absence of an objection in the trial court. *Scarber v. State*, 226 Ark. 503, 291 S.W.2d 241 (1956).

Evidence insufficient to sustain objection that the jury and officers were not properly sworn in accordance with this section. *Scarber v. State*, 226 Ark. 503, 291 S.W.2d 241 (1956).

Swearing Officers.

It is too late to object after verdict that the officer in charge of the jury was not sworn as directed by this section, where the defendant was present when the jury retired and did not request that the oath be administered nor object. *Lee v. State*, 56 Ark. 4, 19 S.W. 16 (1892); *Atterberry v. State*, 56 Ark. 515, 20 S.W. 411 (1892).

Where the officer in charge leaves the jury in charge of another officer not specifically sworn, the purity of the trial is thereby impeached. *Sutherland v. State*, 76 Ark. 487, 89 S.W. 462 (1905).

If the sheriff has previously been sworn with reference to taking charge of the jury in the case, he need not be sworn again under subdivision (b)(2). *Whitley v. State*, 114 Ark. 243, 169 S.W. 952 (1914).

Upon the jury being allowed to view the scene of the alleged crime, it is mandatory that the officers conducting the jury to the scene be sworn in accordance with subdivision (c)(2). *Baxter v. State*, 225 Ark. 239, 281 S.W.2d 931 (1955).

It was error for the trial judge not to administer the mandatory oath to the persons he placed in charge of the sequestered jury where the defendant's attorney objected twice to the trial judge's failure to swear the officers. *Foster v. State*, 285 Ark. 363, 687 S.W.2d 829 (1985), cert. denied, 482 U.S. 929, 107 S. Ct. 3213, 96 L. Ed. 2d 700 (1987).

Even though the trial court did not fully comply with the mandates of this section when administering an oath to the officer conducting the jury view, the trial court's error did not require reversal where nothing in the record suggested that any officer or juror misconduct occurred during

the jury's trip or that prejudice resulted. *Jefferson v. State*, 328 Ark. 23, 941 S.W.2d 404 (1997).

While a trial court's failure to give an officer the special oath required under this section might result in some misconduct or prejudicial error, such error does not encompass a fundamental or structural right such as the right to trial by jury. *Jefferson v. State*, 328 Ark. 23, 941 S.W.2d 404 (1997).

View of Crime Scene.

When a view of the locality where the crime is alleged to have been committed is ordered by the court, the defendant must be permitted to accompany the jury. *Benton v. State*, 30 Ark. 328 (1875).

Defendant cannot complain if he could have gone with jury for view of crime scene, but does not avail himself of the opportunity. *Owen v. State*, 86 Ark. 317, 111 S.W. 466 (1908).

It was not error to admit photographs of the locus in quo which correctly reproduced the scene of the alleged crime and which may have had some probative value. *Zinn v. State*, 135 Ark. 342, 205 S.W. 704 (1918).

Court did not err in denying request that jury view scene of alleged crime. *Hogan v. State*, 224 Ark. 191, 272 S.W.2d 312 (1954); *Orsini v. State*, 281 Ark. 348, 665 S.W.2d 245, cert. denied, 469 U.S. 847, 105 S. Ct. 162, 83 L. Ed. 2d 98 (1984).

A request to view a place pertinent to a material fact is a matter within the trial court's discretion and that exercise of discretion is not a ground for reversal absent a showing of abuse of discretion. *Lee v. State*, 229 Ark. 354, 315 S.W.2d 916 (1958), cert. denied, 359 U.S. 930, 79 S. Ct. 616, 3 L. Ed. 2d 633 (1959); *Orsini v. State*, 281 Ark. 348, 665 S.W.2d 245, cert. denied, 469 U.S. 847, 105 S. Ct. 162, 83 L. Ed. 2d 98 (1984).

Cited: *Baxter v. State*, 225 Ark. 239, 281 S.W.2d 931 (1955); *Scarber v. State*, 226 Ark. 503, 291 S.W.2d 241 (1956); *Anderson v. State*, 278 Ark. 171, 644 S.W.2d 278 (1983).

16-89-119. Lack of jurisdiction.

(a) If, during the trial, it shall appear that the offense was committed out of the jurisdiction of the court, but within the jurisdiction of some other court of this state, the court shall stop the trial, discharge the jury, and take the proceedings in the case as directed in § 16-85-708.

(b) If it appears the offense was committed out of the state, the trial shall be stopped as in subsection (a) of this section and the defendant either discharged or ordered to be retained in custody for a reasonable time until the counsel for the state shall have an opportunity to inform the chief executive officer of the state in which the offense was committed of the facts and for that officer to require the delivery of the offender.

History. Crim. Code, §§ 229, 230; C. & M. Dig., §§ 3197, 3198; Pope's Dig., §§ 4033, 4034; A.S.A. 1947, §§ 43-2123, 43-2124.

Cross References. Jurisdiction and venue, § 16-88-101 et seq.

CASE NOTES

Presumption.

Where defendant prematurely presented his motion to transfer case on basis of lack of venue from one county to another, state was not required to put on proof that charge was committed in first

county, as the information stated that the crime was committed therein and venue was presumed proper unless there was affirmative evidence to the contrary. *Baggett v. State*, 15 Ark. App. 113, 690 S.W.2d 362 (1985).

16-89-120. Proof of higher offense.

(a) If, during the trial, the court shall be of the opinion that the facts proved constitute an offense of a higher nature than that charged in the indictment, it may direct the jury to be discharged and all proceedings to be suspended until the case can be resubmitted to a grand jury and may order the defendant to be committed or admit him or her to bail to answer any new indictment which may be found against him or her for the higher offense.

(b) If an indictment is not found for the higher offense before the next grand jury is discharged, the court must proceed to try the defendant on the original indictment.

History. Crim. Code, § 231; C. & M. Dig., § 3199; Pope's Dig., § 4035; A.S.A. 1947, § 43-2125.

16-89-121. Facts charged do not constitute offense.

If, during the trial, the court is of the opinion that the facts charged in the indictment do not constitute an offense punishable by law, it shall order the jury to be discharged and the indictment to be quashed, and thereupon take the proceedings directed in § 16-89-113(b).

History. Crim. Code, § 232; C. & M. Dig., § 3200; Pope's Dig., § 4036; A.S.A. 1947, § 43-2126.

16-89-122. Dismissal of indictment.

The prosecuting attorney, with the permission of the court, may at any time before the case is finally submitted to the jury dismiss the indictment as to all or a part of the defendants and the dismissal shall not bar a future prosecution for the same offense.

History. Crim. Code, § 242; C. & M. Dig., § 3063; Pope's Dig., § 3889; A.S.A. 1947, § 43-2127.

CASE NOTES

ANALYSIS

Multiple defendants.
Nolle prosequi.

Multiple Defendants.

Any one of the defendants may be placed on trial when the cases of those preceding him have been dismissed. *Borland v. State*, 158 Ark. 37, 249 S.W. 591 (1923).

Nolle Prosequi.

Dismissal of indictment by nolle prose-

qui is not a bar to future prosecution for same offense. *Moore v. State*, 170 Ark. 697, 280 S.W. 657 (1926); *Halton v. State*, 224 Ark. 28, 271 S.W.2d 616 (1954).

Dismissal, or nolle prosequi, was not a bar to a future prosecution for the same offense as the effect was to set aside or annul the indictment. *Jones v. State*, 347 Ark. 455, 65 S.W.3d 402 (2002), cert. denied, 536 U.S. 909, 122 S. Ct. 2366, 153 L. Ed. 2d 187 (2002).

Cited: *Austin v. State*, 193 Ark. 833, 103 S.W.2d 56 (1937).

16-89-123. Order of final arguments.

(a) If the case is not submitted without argument, the party having the burden of proof shall have the opening and conclusion of the argument. If, upon the demand of the adverse party, the attorney prosecuting for the state or the attorney for the defense shall refuse to openly and fully state the grounds on which he or she claims a verdict, the party so refusing shall be refused the conclusion of the argument.

(b) If more than one (1) counsel on each side shall argue the case, they shall do so alternately.

History. Crim. Code, §§ 226, 227; Acts 1877, No. 35, § 1, p. 30; C. & M. Dig., §§ 3185, 3186; Pope's Dig., §§ 4021, 4022; A.S.A. 1947, §§ 43-2132, 43-2133.

CASE NOTES

ANALYSIS

Attorney assisting prosecution.
Disclosure of grounds.
Effect of admission.
Multiple attorneys.
Time limit.

Attorney Assisting Prosecution.

The closing argument may be made by an attorney assisting the prosecution. *Coon v. State*, 109 Ark. 346, 160 S.W. 226 (1913).

The opening argument may be made by an attorney assisting the prosecution. *Tiner v. State*, 115 Ark. 494, 172 S.W. 1010 (1914).

Disclosure of Grounds.

If the attorney assisting the prosecution fails in his opening argument to state fully the grounds upon which he relies for a conviction, he will not be permitted to close. *Burrow v. State*, 109 Ark. 365, 159 S.W. 1123 (1913).

Failure of court to grant motion requiring prosecuting attorney to fully disclose the grounds upon which he would rely for conviction in his opening argument was harmless error, since the prosecution did, in fact, make adequate disclosure. *Rooks v. State*, 250 Ark. 561, 466 S.W.2d 478 (1971).

Effect of Admission.

Defendant cannot, by admitting the homicide and setting up insanity as a defense, obtain right to open and close argument. *Bolling v. State*, 54 Ark. 588, 16 S.W. 658 (1891).

Multiple Attorneys.

Trial court did not err in requiring state

to open argument and then the two attorneys for the defense to make their arguments, with the state closing, since burden of proving defendant guilty beyond a reasonable doubt remained with the state. *Young v. State*, 230 Ark. 737, 324 S.W.2d 524 (1959).

Time Limit.

Court may limit time of argument of counsel. *Vaughan v. State*, 58 Ark. 353, 24 S.W. 885 (1894).

Cited: *American Livestock Ins. Co. v. Garrison*, 28 Ark. App. 330, 774 S.W.2d 431 (1989); *Caldwell v. State*, 322 Ark. 543, 910 S.W.2d 667 (1995).

16-89-124. Exceptions to decisions of the court.

(a) Upon the trial of criminal or penal prosecutions, either party may except to any decision of the court by which the substantial rights of the party are prejudiced, subject to the restrictions in subsection (b) of this section.

(b) The decisions of the court upon challenges to the panel and for cause shall not be subject to exception.

(c) The exception shall be shown upon the record by a bill of exceptions prepared, settled, and signed as provided in the Code of Practice in Civil Cases of 1869.

History. *Crim. Code*, §§ 276-278; *C. & M. Dig.*, §§ 3226-3228; *Pope's Dig.*, §§ 4066-4068; *A.S.A.* 1947, §§ 43-2128 — 43-2130.

Publisher's Notes. A former provision of this section, that the decisions of the court upon motions to set aside indict-

ments would not be subject to exception, was held unconstitutional in *Palmore v. State*, 29 Ark. 248 (1874).

Cross References. Exceptions and motion for new trial unnecessary to preserve an error for review on appeal, § 16-91-113, *ARCrP* 36.21.

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Appeal Without Bill of Exceptions.

In the absence of a bill of exceptions, it will be presumed in the Supreme Court that the verdict was sustained by the evidence. *Wigley v. State*, 41 Ark. 225 (1883).

Where there is no bill of exceptions, the Supreme Court is limited to a review of errors apparent in the record. *Williams v. State*, 47 Ark. 230, 1 S.W. 149 (1886).

Contents of Bill of Exceptions.

Where an objection to the admissibility

of testimony, or a motion to exclude it, is overruled, the objection or the motion and the ruling of the court and exceptions to the ruling must be shown in the bill of exceptions and the ruling of the court made a ground for new trial, or they will not be noticed in the Supreme Court. *Walker v. State*, 39 Ark. 221 (1882).

The facts upon which errors are assigned must be set forth in the bill of exceptions. *Chiles v. State*, 45 Ark. 143 (1885).

When defect of proof is relied upon, all the evidence must be set out in bill of exceptions; where instructions and rulings are complained of, only the sub-

stance. *Ballentine v. State*, 48 Ark. 45, 2 (1875); *Gross v. Bishop*, 273 F. Supp. 992 S.W. 340 (1886). (E.D. Ark. 1967).

Cited: *Benton v. State*, 30 Ark. 328

16-89-125. Deliberation of jury.

(a) While the jury is absent, the court may adjourn from time to time as to other business, but it shall be deemed open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury discharged.

(b) When the evidence is concluded, the court shall, on motion of either party, instruct the jury on the law applicable to the case. If the defense is the insanity of the defendant, the jury must be instructed to state that fact in their verdict if they acquit him or her on that ground.

(c) A suitable room must be provided for the use of the jury on their retirement for deliberation, with suitable furniture, fuel, lights, and stationery.

(d)(1) After the cause is submitted to the jury, they must be kept together in the charge of the sheriff, in the room provided for them, except during their meals and periods for sleep, unless they are permitted to separate by order of the court.

(2) Suitable food and lodging must be provided by the sheriff and the expense paid by the county.

(3) Upon retiring for deliberation, the jury may take with them all papers which have been received as evidence in the cause.

(e) After the jury retires for deliberation, if there is a disagreement between them as to any part of the evidence or if they desire to be informed on a point of law, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of or after notice to the counsel of the parties.

(f)(1) If, after retirement, one of the jurors becomes so sick as to prevent the continuance of his or her duty, or other accident or cause occurs preventing the jury from being kept together or, after being kept together such a length of time as the court deems proper, they do not agree in a verdict and it satisfactorily appears that there is no probability they can agree, the court may discharge them.

(2) In all cases where a jury is discharged, either in the progress of a trial or after the cause is submitted to them, the cause may again be tried at the same or another term of the court.

History. Crim. Code, §§ 225, 245-251, 265; C. & M. Dig., §§ 3179, 3189-3195, 3215; Pope's Dig., §§ 4015, 4025-4031, 4051; A.S.A. 1947, §§ 43-2134 — 43-2142.

Cross References. Additional instructions, ARCrP 33.4.

Charge to juries, Ark. Const., Art. 7, § 23.

Delivery of instructions to jury, ARCrP 33.3.

Keeping during deliberation of notes taken by jurors during trial, ARCrP 33.2.

RESEARCH REFERENCES

UALR L.J. Derden, Survey of Arkansas Law: Criminal Procedure, 2 UALR L.J. 203.

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Construction.

This section is mandatory and should be strictly followed. *Tarry v. State*, 289 Ark. 193, 710 S.W.2d 202 (1986); *Huckabee v. State*, 30 Ark. App. 82, 785 S.W.2d 223 (1990).

The provisions of this section requiring the judge to call the jury into open court to answer any questions the jury may have are mandatory; therefore, the judge could not answer the jury's questions by sending notes or a tape recording of the proceedings to the jury room. *Rhodes v. State*, 290 Ark. 60, 716 S.W.2d 758 (1986).

ARCrP 33.3 does not contravene or modify this section. *Bennett v. State*, 302 Ark. 179, 789 S.W.2d 436, cert. denied, 498 U.S. 851, 111 S. Ct. 144, 112 L. Ed. 2d 110 (1990).

Applicability.

Section held not applicable. *Hopes v. State*, 294 Ark. 319, 742 S.W.2d 561 (1988).

This section held not to apply where court, in camera and outside the presence of counsel and the other jurors, examined one juror who wanted to know whether he could impart what he had seen to the other jurors. *Clayton v. State*, 321 Ark. 602, 906 S.W.2d 290 (1995).

Adjournment.

Court may, after receiving verdict on Sunday, adjourn over to another day. *Eyer v. State*, 112 Ark. 37, 164 S.W. 756 (1914).

Discharge Before Verdict.

It is competent for the court, where the jury cannot agree, to discharge them and hold the accused for trial on the same indictment by another jury, as also, where a juror in the course of a trial becomes so ill, or the prisoner becomes so sick, or in like cases of impossibility to proceed, but beyond this the authority of the court does not extend. *Lee v. State*, 26 Ark. 260 (1870).

A discharge of a juror without defendant's consent after he has been put in jeopardy operates as an acquittal, except in cases of overruling necessity, as the death or illness of the judge or a juror, or inability of the jury to agree on a verdict. *Whitmore v. State*, 43 Ark. 271 (1884).

Consent of a defendant that the jury may separate is not consent that one may absent himself and necessitate the discharge of the jury, and such a discharge without defendant's consent will operate as an acquittal. *State v. Ward*, 48 Ark. 36, 2 S.W. 191 (1886).

It is in the discretion of the court to excuse a juror for ill health. *Hamilton v. State*, 62 Ark. 543, 36 S.W. 1054 (1896).

In a criminal prosecution, the court may discharge the jury when the jury fails to agree upon a verdict and it satisfactorily appears to the trial judge that there is no probability of a verdict being reached. *Carmen v. State*, 120 Ark. 172, 179 S.W. 183 (1915).

Trial court did not abuse its discretion when it declared a mistrial after jury

foreman reported deadlock. *Beard v. State*, 277 Ark. 35, 639 S.W.2d 52 (1982).

Exhibits.

The court did not impermissibly comment on the evidence when it sent all of the evidence to the jury for review following a request by the jury to see a single piece of evidence. *Goff v. State*, 341 Ark. 567, 19 S.W.3d 579 (2000).

Ex Parte Communications.

Although it was inappropriate for the trial court to engage in any type of ex parte communication with the jury, the trial court's actions did not result in prejudice to the defendant where (1) when the jury sent out a question, it was discussed with both attorneys, and on at least one occasion, the attorneys were present with the judge at the jury room door when the jury asked a question, and (2) the trial court presented the jury's questions to the court reporter so that the information could be transcribed on the record. *Bledsoe v. State*, 344 Ark. 86, 39 S.W.3d 760 (2001).

Extraneous Information.

Trial court did not err in allowing the jury to have an atlas during deliberations because the trial court followed the procedures of subsection (e) and prejudice was not presumed, even if the trial court abused its discretion in allowing the jury to have the extraneous information; the jury deliberated for some time after receiving the atlas and the court did not see how defendant might have suffered prejudice in this regard. *Fisher v. State*, 84 Ark. App. 318, 139 S.W.3d 815 (2004).

Instructions Generally.

For cases discussing instructions which must be in writing, see: *Wallace v. State*, 28 Ark. 531 (1873); *Palmore v. State*, 29 Ark. 248 (1874); *Polk v. State*, 36 Ark. 117 (1880); *Fitzpatrick v. State*, 37 Ark. 238 (1881); *Mazzia v. State*, 51 Ark. 177, 10 S.W. 257 (1889); *Burnett v. State*, 72 Ark. 398, 81 S.W. 382 (1904).

It is error to give inconsistent and conflicting instructions. *Smith v. State*, 55 Ark. 259, 18 S.W. 237 (1891); *Selden v. State*, 55 Ark. 393, 18 S.W. 459 (1892); *Frazier v. State*, 56 Ark. 242, 19 S.W. 838 (1892); *Vaughan v. State*, 58 Ark. 353, 24 S.W. 885 (1894); *Jones v. State*, 89 Ark. 213, 116 S.W. 230 (1909).

Instructions should be applicable to opposing theories of the parties, and should declare the law applicable to any of the facts which upon the evidence may be taken by either party. *Vaughan v. State*, 57 Ark. 1, 20 S.W. 588 (1892).

Court must not say how much weight should be given to any state of facts. *Denmark v. State*, 58 Ark. 576, 25 S.W. 867 (1894); *Sons v. State*, 116 Ark. 357, 172 S.W. 1029 (1915).

It is error to refuse to give a proper instruction as to reasonable doubt. *Terrell v. State*, 69 Ark. 449, 64 S.W. 223 (1901); *Bruce v. State*, 71 Ark. 475, 75 S.W. 1080 (1903), overruled on other grounds, *Horton v. Jackson*, 87 Ark. 528, 113 S.W. 45 (1908).

For cases discussing necessity for requesting instructions, see: *Vasser v. State*, 75 Ark. 373, 87 S.W. 635 (1905); *Jackson v. State*, 92 Ark. 71, 122 S.W. 101 (1909); *Roy v. State*, 102 Ark. 588, 145 S.W. 190 (1912); *Carlton v. State*, 109 Ark. 516, 161 S.W. 145 (1913); *Tiner v. State*, 115 Ark. 494, 172 S.W. 1010 (1914); *Webb v. State*, 154 Ark. 67, 242 S.W. 380 (1922); *Judd v. State*, 192 Ark. 1178, 96 S.W.2d 604 (1936); *Roberts v. State*, 254 Ark. 39, 491 S.W.2d 390 (1973); *Tyler v. State*, 265 Ark. 822, 581 S.W.2d 328 (1979); *Byers v. State*, 267 Ark. 1097, 594 S.W.2d 252 (Ct. App. 1980); *Schwindling v. State*, 269 Ark. 388, 602 S.W.2d 639 (1980).

All the instructions are to be read and construed as a whole and are entitled to a reasonable interpretation. *Arnott v. State*, 109 Ark. 378, 159 S.W. 1105 (1913).

For cases discussing argumentative instructions, see: *Moore v. State*, 109 Ark. 475, 160 S.W. 206 (1913); *Price v. State*, 114 Ark. 398, 170 S.W. 235 (1914).

Court should not single out specific features of a case and emphasize them in separate instructions, but should submit all the facts and circumstances together for the consideration of the jury. *Price v. State*, 114 Ark. 398, 170 S.W. 235 (1914); but see *Tillman v. State*, 112 Ark. 236, 166 S.W. 582 (1914).

Abstract instructions should be refused. *Beavers v. State*, 54 Ark. 336, 15 S.W. 1024 (1891); *Stevens v. State*, 117 Ark. 64, 174 S.W. 219 (1915).

General instructions may be cured by specific ones. *Zinn v. State*, 135 Ark. 342, 205 S.W. 704 (1918).

Attorneys may read the instruction to

the jury. *Davis v. State*, 155 Ark. 245, 244 S.W. 750 (1922).

Failure of court to instruct jury on presumption of innocence at the beginning of the trial did not constitute error, as instructions are to be made at the conclusion of the evidence. *Ricketts v. State*, 254 Ark. 409, 494 S.W.2d 462 (1973).

A trial judge does not have to give an instruction where there is no evidence to support the giving of that instruction. *Blair v. State*, 284 Ark. 330, 681 S.W.2d 374 (1984).

While the trial court may have erred in instructing the jury prematurely, the preliminary instructions occasioned defendant no prejudice and, though error, were harmless. *Jones v. State*, 318 Ark. 704, 889 S.W.2d 706 (1994).

—Insanity.

Failure of court to instruct jury that if they acquit defendant on the ground of insanity to state that fact in their verdict, was harmless, where the jury did not acquit him. *Downs v. State*, 231 Ark. 466, 330 S.W.2d 281 (1959).

The jury is not to be told the options available to the trial court when a defendant is found not guilty by mental defect or disease. *Robertson v. State*, 304 Ark. 332, 802 S.W.2d 920 (1991).

—Objections.

Objection to part of instruction must be specific, not general. *Thomas v. State*, 74 Ark. 431, 86 S.W. 404 (1905); *Burnett v. State*, 80 Ark. 225, 96 S.W. 1007 (1906); *Jackson v. State*, 94 Ark. 169, 126 S.W. 843 (1910); *Cox v. State*, 99 Ark. 90, 136 S.W. 989 (1911); *Burgess v. State*, 108 Ark. 508, 158 S.W. 774 (1913); *Banks v. State*, 133 Ark. 169, 202 S.W. 43 (1918).

A series of instructions which supplement each other and, taken as a whole state the law correctly, is not objectionable, though some of them, standing alone, are objectionable for stating the law incompletely. *Satterwhite v. State*, 82 Ark. 64, 100 S.W. 70 (1907).

Exceptions in gross to several instructions will not be considered if any of them are correct. *Johnson v. State*, 84 Ark. 95, 104 S.W. 929 (1907); *Bruder v. State*, 110 Ark. 402, 161 S.W. 1067 (1913).

Jury Disagreement or Confusion.

Trial court's discretion should extend to a determination of whether or not the jury

has expressed sufficient disagreement or confusion over some aspect of the testimony, thereby warranting a repeat of some portion of it. *McKinney v. State*, 303 Ark. 257, 797 S.W.2d 415 (1990).

The question of whether a jury is in sufficient disagreement or confusion to merit the requested information should be examined on a case by case basis, and although the request should not be granted merely to refresh a juror's recollection, it is not necessary for a literal argument to arise between jurors before they can receive requested evidence. *McKinney v. State*, 303 Ark. 257, 797 S.W.2d 415 (1990).

Because at least one juror was in doubt about a certain part of the evidence, it was not prejudicial for the trial court, pursuant to subsection (e) of this section, to play a part of the defendant's testimony for the jury. *Newman v. State*, 353 Ark. 258, 106 S.W.3d 438 (2003).

Keeping Jurors Together.

It is within the discretion of the trial court to permit the jury to separate, or keep them together, before or after the case is submitted to them. *Johnson v. State*, 32 Ark. 309 (1877); *Armstrong v. State*, 102 Ark. 356, 144 S.W. 195 (1912).

Permitting jury to occupy separate cabins was not error, where evidence showed jury did not communicate with outside persons and nothing occurred to influence them. *Smith v. State*, 194 Ark. 264, 106 S.W.2d 1019 (1937).

Although it may be preferable to sequester the jury, it is a matter upon which the trial court must decide; the burden of proof to show that defendant did not receive an impartial trial because of failure to sequester the jury is upon defendant. *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3, cert. denied, 459 U.S. 1022, 103 S. Ct. 389, 74 L. Ed. 2d 519 (1982).

Noncompliance.

Noncompliance with this section gives rise to a presumption of prejudice, and the state has the burden of overcoming that presumption. *Tarry v. State*, 289 Ark. 193, 710 S.W.2d 202 (1986); *Huckabee v. State*, 30 Ark. App. 82, 785 S.W.2d 223 (1990).

Where the judge went into the jury room, by agreement of counsel, to answer the jury's questions concerning the defendant's sentence and parole eligibility, the

state did not meet its burden of showing what occurred; therefore, the trial judge's violation of this section must be deemed to have been prejudicial to the defendant and was reversible error. *Tarry v. State*, 289 Ark. 193, 710 S.W.2d 202 (1986).

Where juror asked trial judge a question concerning testimony of one of the witnesses, after jury had begun deliberations, and judge answered, and record did not contain the conversation and attorneys were not given opportunity to object, there was no compliance with subsection (e). *Huckabee v. State*, 30 Ark. App. 82, 785 S.W.2d 223 (1990).

Where trial judge orally gave jury ten instructions before opening statements and gave two more at the end of the trial but refused to grant defendant's motion to repeat all of the instructions, action of trial judge in giving all but two of the oral instructions at the beginning of trial violated this section and was reversible error. *Bennett v. State*, 302 Ark. 179, 789 S.W.2d 436, cert. denied, 498 U.S. 851, 111 S. Ct. 144, 112 L. Ed. 2d 110 (1990).

Noncompliance with subsection (e) of this section gives rise to a presumption of prejudice, and the state has the burden of overcoming that presumption. *Davlin v. State*, 313 Ark. 218, 853 S.W.2d 882 (1993).

If the procedure mandated by this section is not followed by the trial court, the state bears the burden of proving that no prejudice resulted. *Sanders v. State*, 317 Ark. 328, 878 S.W.2d 391 (1994), cert. denied, 513 U.S. 1162, 115 S. Ct. 1126, 130 L. Ed. 2d 1088 (1995).

—Open Court.

The trial judge's court's error in failing to comply with subsection (e) by visiting the jury room alone deprived defendant of a fundamental right which required protection, and as such, did not require a contemporaneous objection to preserve the issue for appeal. *Goff v. State*, 329 Ark. 513, 953 S.W.2d 38 (1997).

The language in subsection (e) mandates that a jury which is in deliberation must be brought into open court before any information may be given to it, and noncompliance with this provision gives rise to a presumption of prejudice; if the judge instead visits the jury room, the State has the burden of rebutting that presumption. *Goff v. State*, 329 Ark. 513, 953 S.W.2d 38 (1997).

—Prejudice Not Found.

Where the record reflected what occurred when the jury sent a note to the judge and the judge's response, and where the court gave notice of the jury's note to defense counsel before the jury returned, who made no motions or objections to the court's response at that time, the court's communication with the jury was not prejudicial to defendant; a mistrial was not required. *Houston v. State*, 41 Ark. App. 67, 848 S.W.2d 430 (1993).

State rebutted the presumption of prejudice from the trial court's violation of subsection (e) by showing the court's communication with the jury was limited to answering the jury's question, using language agreed to by the parties. *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002).

Trial court violated subsection (c) of this section by communicating with the jury other than in open court by responding in writing to a jury question, but the state rebutted the presumption of prejudice because the record reflected the substance of the court's communication with the jury, defendant never objected to that substance, and the court never had any contact with the jury during deliberations. *Anderson v. State*, 353 Ark. 384, 108 S.W.3d 592 (2003), cert. denied, 540 U.S. 1050, 124 S. Ct. 832, 157 L. Ed. 2d 699 (2003).

—Waiver.

Strict compliance with this section was waived, where the attorneys went with the judge to the jury room, everything that happened was reported in the record, and there was no possibility of prejudice. *Tarry v. State*, 289 Ark. 193, 710 S.W.2d 202 (1986).

Where the record was silent as to what occurred during the replaying of a videotape, pursuant to a request under subsection (e) of this section, there was no waiver of the procedural requirements of subsection (e) by the defendant. *Davlin v. State*, 313 Ark. 218, 853 S.W.2d 882 (1993).

Papers.

The jury should not be permitted to take with them papers containing statements bearing on the case which were not read in evidence. *Palmore v. State*, 29 Ark. 248 (1874).

It is in the discretion of the court to determine whether the jury shall take the

instructions with them when they retire. *Hurley v. State*, 29 Ark. 17 (1874); *Benton v. State*, 30 Ark. 328 (1875).

Evidence showed possession by jury of defendant's motion for continuance was improper but not reversible error, and it was not error, while that paper was in the possession of the jury, to refuse a request of the jury to permit them to take a testamentary letter allegedly written by defendant for purpose of comparing signatures on both papers. *Phillips v. State*, 62 Ark. 119, 34 S.W. 539 (1896).

The word "may" in subdivision (d)(3) indicates the statute was intended to be permissive and not mandatory, and, in the absence of any request by the appellant for the jury to receive the other exhibits which had been introduced in evidence, the trial court had the right to give the jury the one they requested to see, or the confession, after they had retired for deliberation. *Nathan v. State*, 235 Ark. 704, 361 S.W.2d 637 (1962).

Allowing the jury to have access to something which has not been admitted into evidence will not necessarily, without more, constitute an abuse of discretion. *Dickerson Constr. Co. v. Dozier*, 266 Ark. 345, 584 S.W.2d 36 (1979).

Retrial.

Holding second trial at the same term of first trial was not error. *Hudspeth v. State*, 194 Ark. 576, 108 S.W.2d 1085 (1937).

Court was authorized to retry a defendant at same term of court where there was a mistrial due to disagreement. *Wimberly v. State*, 214 Ark. 930, 218 S.W.2d 730 (1949).

Where the evidence presented in a prosecution for theft of property was sufficient, as a matter of law, to support a conviction, but a mistrial was declared after the jury reported that it was hopelessly deadlocked, it would not constitute double jeopardy to permit a retrial for the theft of property. *Beard v. State*, 277 Ark. 35, 639 S.W.2d 52 (1982).

A defendant's double jeopardy rights are not violated if he is required to stand trial following a mistrial due to a hung jury. *Bell v. State*, 6 Ark. App. 388, 644 S.W.2d 601 (1982).

Strict Compliance.

Requirement that subsection (e) be strictly followed focuses not on the express

reason for the jury to request the information, but the procedure by which the request is presented. *McKinney v. State*, 303 Ark. 257, 797 S.W.2d 415 (1990).

Although subsection (e) of this section does not expressly require a defendant's presence during the representation of evidence or instruction of law, when the trial court did not comply strictly with the procedural requirements of subsection (e), the failure to have the defendant present was reversible error. *Davlin v. State*, 313 Ark. 218, 853 S.W.2d 882 (1993).

Strict compliance with the procedural requirements of subsection (e) of this section may be waived. *Davlin v. State*, 313 Ark. 218, 853 S.W.2d 882 (1993).

The procedure set forth in this section is mandatory and must be strictly followed; the provisions of subsection (e) of this section are mandatory, in part, to ensure that the jury is not misinformed regarding the law as a consequence of the trial court's explaining the law to only one member of the jury. *Sanders v. State*, 317 Ark. 328, 878 S.W.2d 391 (1994), cert. denied, 513 U.S. 1162, 115 S. Ct. 1126, 130 L. Ed. 2d 1088 (1995).

Subsequent Instructions.

Subsection (e) is mandatory. *Wacaster v. State*, 172 Ark. 983, 291 S.W. 85 (1927); *Durham v. State*, 179 Ark. 507, 16 S.W.2d 991 (1929); *Rollie v. State*, 236 Ark. 853, 370 S.W.2d 188 (1963); *Andrews v. State*, 251 Ark. 279, 472 S.W.2d 86 (1971); *Martin v. State*, 254 Ark. 1065, 497 S.W.2d 268 (1973); *Jackson v. State*, 256 Ark. 406, 507 S.W.2d 705 (1974).

Where defendant agreed to judge's entering the jury room and giving the jury further instructions in violation of subsection (e), he waived his right to challenge the action unless it was prejudicial to his rights. *Boone v. State*, 230 Ark. 821, 327 S.W.2d 87 (1959).

Subsection (e) requires that the entire jury must be present before the court and counsel for the parties, or that notice be given to counsel, upon any proceeding affecting the rights of the defendant or the state. *Rollie v. State*, 236 Ark. 853, 370 S.W.2d 188 (1963).

Subsection (e) should be strictly construed. *Andrews v. State*, 251 Ark. 279, 472 S.W.2d 86 (1971); *Martin v. State*, 254 Ark. 1065, 497 S.W.2d 268 (1973); *Jackson v. State*, 256 Ark. 406, 507 S.W.2d 705 (1974).

—Bailiff.

Advice of bailiff to jury held prejudicial. *Williams v. State*, 264 Ark. 77, 568 S.W.2d 30 (1978).

Where the bailiff relayed a request from the jury in the jury room for further instructions, and the bailiff, accompanied by attorneys for both parties, returned to the jury room with the judge's response that no further advice could be given on the matter, and defendant did not show that the bailiff counseled the jury on a point of law or acted to prejudice the defendant's rights, the judge did violate subsection (e) by relaying communications to the jury through the bailiff, but in the absence of a showing of prejudice to the defendant, the error was harmless. *Wilson v. State*, 272 Ark. 361, 614 S.W.2d 663 (1981).

—Presence of Defendant.

Error of judge's rereading the instructions in the absence of the defendant's counsel was waived where defense was informed of what the court did before the jury retired but offered no objection. *Wawak v. State*, 170 Ark. 329, 279 S.W. 997 (1926).

Where court gives additional instruction to foreman of jury, in absence of defendant and his attorney, error is not cured by testimony of jurors that they had already reached a verdict of guilty before the instruction was given. *Wacaster v. State*, 172 Ark. 983, 291 S.W. 85 (1927).

It was reversible error for the court to charge individual jurors as to the law of the case in the absence of the accused and his counsel and after the jury had been deliberating for a considerable period of time without reaching a verdict. *Hopkins v. State*, 174 Ark. 391, 295 S.W. 361 (1927).

Defendant's right to be present was not prejudiced when his counsel waived that right prior to entry by both counsels and judge into the jury room at the jury's request. *Jackson v. State*, 256 Ark. 406, 507 S.W.2d 705 (1974).

Trial court committed reversible error in declining to answer the jury's questions about specific testimony, since the jury's inquiry and the court's ruling on the request were made during the absence of defense counsel. *Golf v. State*, 261 Ark. 885, 552 S.W.2d 236 (1977).

—Sentence.

It was not error for the jury to ask the court if they could recommend a sus-

pending sentence. *Pendleton v. State*, 211 Ark. 1054, 204 S.W.2d 559 (1947).

Judge's response to question concerning sentence held to be prejudicial. *Bell v. State*, 223 Ark. 304, 265 S.W.2d 709 (1954).

Where the jury, after some deliberation, returned to open court with a finding of guilt, but with the sentencing portion of the verdict form blank, the trial court did not abuse its discretion when in the presence of the entire jury, the defendant, and counsel for both the state and the defendant, it gave the jury additional instructions regarding its duty to specify the exact penalty to be imposed. *Pruitt v. State*, 8 Ark. App. 350, 652 S.W.2d 51 (1983).

—Single Juror.

If jurors are permitted to separate and one of them communicates with the court and the court gives an instruction, the presumption is that it would be prejudicial, but this error may be waived either by the defendant or his attorney. *Smith v. State*, 194 Ark. 264, 106 S.W.2d 1019 (1937).

Permitting one of the jurors to separate from the other eleven and go into the court room to talk to the court held not prejudicial. *Smith v. State*, 194 Ark. 264, 106 S.W.2d 1019 (1937).

Permitting one of the jurors to separate from the other eleven and go into courtroom to talk to court held to be prejudicial. *Rollie v. State*, 236 Ark. 853, 370 S.W.2d 188 (1963); *Andrews v. State*, 251 Ark. 279, 472 S.W.2d 86 (1971).

Cited: *Jones v. State*, 54 Ark. 371, 15 S.W. 1026 (1891); *Johnson v. State*, 60 Ark. 45, 28 S.W. 792 (1894); *Rogers v. State*, 60 Ark. 76, 29 S.W. 894 (1894); *State v. McNamara*, 60 Ark. 400, 30 S.W. 762 (1895); *Carpenter v. State*, 62 Ark. 286, 36 S.W. 900 (1896); *Davis v. State*, 63 Ark. 470, 39 S.W. 356 (1897); *Caldwell v. State*, 69 Ark. 322, 63 S.W. 59 (1901); *Rayburn v. State*, 69 Ark. 177, 63 S.W. 356 (1901); *Byrd v. State*, 69 Ark. 537, 64 S.W. 270 (1901); *Bennett v. State*, 70 Ark. 43, 66 S.W. 198 (1901); *Ward v. State*, 70 Ark. 204, 66 S.W. 926 (1902); *Ritter v. State*, 70 Ark. 472, 69 S.W. 262 (1902); *Puckett v. State*, 71 Ark. 62, 70 S.W. 1041 (1902); *Walton v. State*, 71 Ark. 398, 75 S.W. 1 (1903); *Lee v. State*, 72 Ark. 436, 81 S.W. 385 (1904); *Cox v. State*, 72 Ark. 544, 81

S.W. 1056 (1904); Keaton v. State, 73 Ark. 265, 83 S.W. 911 (1904); Mitchell v. State, 73 Ark. 291, 83 S.W. 1050 (1904); Meisenheimer v. State, 73 Ark. 407, 84 S.W. 494 (1904); Humphrey v. State, 74 Ark. 554, 86 S.W. 431 (1905); Beene v. State, 79 Ark. 460, 96 S.W. 151 (1906); Mabry v. State, 80 Ark. 345, 97 S.W. 285 (1906); Bell v. State, 81 Ark. 16, 98 S.W. 705 (1906); Stewart v. State, 88 Ark. 602, 115 S.W. 374 (1909); Dale v. State, 90 Ark. 579, 120 S.W. 389 (1909); Bailey v. State, 92 Ark. 216, 122 S.W. 497 (1909); Bowman v. State, 93 Ark. 168, 129 S.W. 80 (1909); Bennett v. State, 95 Ark. 100, 128 S.W. 851 (1910); Martin v. State, 97 Ark. 212, 133 S.W. 598 (1911); Hathcock v. State, 99 Ark. 65, 137 S.W. 551 (1911); Paul v. State, 99 Ark. 558, 139 S.W. 287 (1911); Caughron v. State, 99 Ark. 462, 139 S.W. 315 (1911); Gilchrist v. State, 100 Ark. 330, 140 S.W. 260 (1911); Fox v. State, 102 Ark. 393, 144 S.W. 516 (1912); Reed v. State, 102 Ark. 525, 145 S.W. 206 (1912);

Monk v. State, 105 Ark. 12, 150 S.W. 133 (1912); West v. State, 105 Ark. 175, 150 S.W. 695 (1912); Gaylord v. State, 108 Ark. 408, 157 S.W. 1156 (1913); Scott v. State, 109 Ark. 391, 159 S.W. 1095 (1913); Woodland v. State, 110 Ark. 15, 160 S.W. 875 (1913); Coulter v. State, 110 Ark. 209, 161 S.W. 186 (1913); Barker v. State, 135 Ark. 404, 205 S.W. 805 (1918); Gardner v. State, 263 Ark. 739, 569 S.W.2d 74 (1978); Cassell v. State, 273 Ark. 59, 616 S.W.2d 485 (1981); Love v. State, 281 Ark. 379, 664 S.W.2d 457 (1984); Howard v. State, 291 Ark. 633, 727 S.W.2d 830 (1987); Weaver v. State, 296 Ark. 152, 752 S.W.2d 750 (1988); National Bank of Commerce v. HCA Health Servs. of Midwest, Inc., 304 Ark. 55, 800 S.W.2d 694 (1990); Scroggins v. State, 312 Ark. 106, 848 S.W.2d 400 (1993); National Bank of Commerce v. HCA Health Servs. of Midwest, Inc., 304 Ark. 55, 800 S.W.2d 694 (1990); Lowry v. State, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 279 (Mar. 23, 2005).

16-89-126. Verdict generally.

(a) When the jury has agreed upon their verdict, they must be conducted into court by the officer having them in charge, their names called by the clerk, and, if they all appear, their foreman must declare their verdict.

(b) The jury may render either a general or a special verdict.

(c) A general verdict is either "guilty" or "not guilty". If the verdict is guilty, the jury must affix the punishment if the amount thereof is not determined by law.

(d)(1) A special verdict is the finding of the facts only, leaving the law arising on the facts to the judgment of the court, with an ascertainment of the punishment in the event that the court pronounces a judgment of conviction on the verdict.

(2) A special verdict must present the conclusions of fact as established by the evidence, and not the evidence of those facts. The facts must be presented so that the court has nothing to do but draw the conclusions of law upon them.

(3) The special verdict must be reduced to writing by the jury and read to them in the presence of the court. It shall not be received by the court unless it pronounces affirmatively on the facts necessary to enable the court to give judgment.

(e)(1) Upon an indictment for an offense consisting of different degrees, the defendant may be found guilty of any degree not higher than that charged in the indictment and may be found guilty of any offense included in that charged in the indictment.

(2)(A) The offenses named in each of the subdivisions of this section shall be deemed degrees of the same offense, in the meaning of subdivision (e)(1) of this section:

(i) All offenses of homicide;

(ii) All injuries to the person by maiming, wounding, beating, and assaulting, whether malicious or from sudden passion, and whether attended or not with the intention to kill;

(iii) All offenses of larceny;

(iv) Arson and house-burning;

(v) Burglary and house-breaking; and

(vi) An offense, and an attempt to commit the offense.

(B) Offenses punished capitally are of the highest degree, other felonies are of higher degree than misdemeanor, and those punished by imprisonment are of higher degree than those punished by fine alone.

(C) Where the punishment is the same in kind, the amount that may be inflicted fixes the degree.

(3) Where there is a reasonable doubt of the degree of the offense which the defendant has committed, he or she shall be convicted only of the lower degree.

(4) When the proof shows the defendant to be guilty of a higher degree of the offense than is charged in the indictment, the jury shall find him or her guilty of the degree charged in the indictment.

(f) Upon an indictment against several, if the jury cannot agree as to all, they may render a verdict as to those concerning whom they do agree, and the case as to the others may be tried by another jury.

(g) When there is a reasonable doubt of the defendant's guilt upon the testimony in the whole case, he or she is entitled to an acquittal.

History. Crim. Code, §§ 237, 238, 253-260, 262, 263; C. & M. Dig., §§ 3183, 3184, 3201-3203, 3207-3211, 3213, 3214; Pope's Dig., §§ 4019, 4020, 4037-4039, 4043-4047, 4049, 4050; A.S.A. 1947,

§§ 43-2143 — 43-2151, 43-2157 — 43-2159.

Cross References. Conduct constituting more than one offense, § 5-1-110. Reasonable doubt, § 5-1-111.

CASE NOTES

ANALYSIS

Appeal.

Degrees of offenses.

— Lesser included offenses.

— Subsequent prosecution.

Form and presentment.

General verdict.

Reasonable doubt.

Reconsideration.

Sentence fixed by jury.

Setting aside.

Appeal.

Verdict will not be disturbed on appeal if there is substantial evidence to support

it. *Gilchrist v. State*, 100 Ark. 330, 140 S.W. 260 (1911).

Even constitutional issues will not be considered when raised on appeal for the first time, and where defendant alleged that he was convicted of a greater offense than that with which he was charged, but had failed to object to the jury instructions or the form of the verdict during the trial, the issue was not preserved, and defendant suffered no real prejudice. *Moore v. State*, 303 Ark. 514, 798 S.W.2d 87 (1990).

Degrees of Offenses.

If the indictment charges an offense of

different grades and the jury returns a general verdict of "guilty as charged" without finding the degree, it will be presumed that the jury found in favor of the higher grade of the offense charged. *Curtis v. State*, 26 Ark. 439 (1871).

In reaching verdict, a doubt as to the degree of the crime, upon the facts of the case, should be resolved in favor of the accused. *Harris v. State*, 36 Ark. 127 (1880); *Price v. State*, 114 Ark. 398, 170 S.W. 235 (1914); *Adams v. State*, 160 Ark. 405, 254 S.W. 832 (1923); *Arnold v. State*, 179 Ark. 1066, 20 S.W.2d 189 (1929).

Defendant cannot be convicted of an offense higher than that charged. *Robbins v. State*, 219 Ark. 376, 242 S.W.2d 640 (1951); *Switzer v. Golden*, 224 Ark. 543, 274 S.W.2d 769 (1955).

—Lesser Included Offenses.

Upon an indictment for a felony, the accused may be convicted of a misdemeanor, where both offenses belong to the same generic class, where the commission of the higher may involve the commission of the lower offense, and where the indictment for the higher offense contains all the necessary substantive allegations to let in proof of the misdemeanor. *Cameron v. State*, 13 Ark. 712 (1853); *Childs v. State*, 15 Ark. 204 (1854); *Sweeden v. State*, 19 Ark. 205 (1857); *Guest v. State*, 19 Ark. 405 (1858); *State v. Cryer*, 20 Ark. 64 (1859); *Bryant v. State*, 41 Ark. 359 (1883).

The finding of a verdict of manslaughter upon an indictment for murder is equivalent to an acquittal of the charge of murder. *McPherson v. State*, 29 Ark. 225 (1874).

If a verdict of "guilty of manslaughter" is returned upon a murder indictment, it will be presumed that voluntary manslaughter was intended. *Fagg v. State*, 50 Ark. 506, 8 S.W. 829 (1888).

An indictment for rape will sustain a conviction for carnal abuse. *Henson v. State*, 76 Ark. 267, 88 S.W. 965 (1905).

An indictment for assault with intent to kill will not sustain a conviction for assault and battery. *Jones v. State*, 100 Ark. 195, 139 S.W. 1126 (1911).

An indictment for rape will sustain a conviction for an assault with intent to commit rape. *Paxton v. State*, 108 Ark. 316, 157 S.W. 396 (1913).

When one is indicted for murder in the

first degree, he may be convicted of manslaughter. *Harris v. State*, 170 Ark. 1073, 282 S.W. 680 (1926).

When on trial for robbery, if defendant is convicted of assault with intent to rob, he is properly convicted. *Hight v. State*, 172 Ark. 240, 288 S.W. 384 (1926).

Manslaughter is one of the degrees of murder. *Ellis v. State*, 234 Ark. 1072, 356 S.W.2d 426 (1962).

—Subsequent Prosecution.

Conviction of a misdemeanor, where the penalty is only a fine, will not bar an indictment for a felony for the same offense. *State v. Nichols*, 38 Ark. 550 (1882).

An acquittal of the charge will bar prosecution for offenses which are essential ingredients of that charge. *Fox v. State*, 50 Ark. 528, 8 S.W. 836 (1888).

A person convicted of a misdemeanor which placed him in jeopardy of liberty may not be indicted for a felony for the same offense. *State v. Smith*, 53 Ark. 24, 13 S.W. 391 (1890).

The conviction of any degree of rape would bar successive prosecution for any other degree of rape. *State v. Lamb*, 251 Ark. 999, 476 S.W.2d 7 (1972).

Form and Presentment.

Where several are jointly indicted and tried together, the verdict and judgment against them should be several; that is, fix the fine or punishment to be paid or suffered by each. *Straughan v. State*, 16 Ark. 37 (1855).

It is not necessary that the verdict should be written upon the indictment, though it is usual to do so. *Atkins v. State*, 16 Ark. 568 (1855).

The verdict is of no validity until delivered by the jury in court, and the clerk cannot receive it in the recess of the court without the direction of the court or consent of parties. *State v. Mills*, 19 Ark. 476 (1858).

The verdict need not be in writing, but may be announced orally by the foreman of the jury and entered by the clerk upon the record, but if it is in writing and responsive to the issue, it is sufficient without the formula "in manner and form as charged in the indictment." *Dixon v. State*, 29 Ark. 165 (1874).

Verdict on an indictment containing two counts is sufficient if it finds the defendant guilty of each offense and assesses his

punishment therefor separately, without alleging that the defendant was guilty as charged in the indictment or as charged in either count. *Lawrence v. State*, 71 Ark. 82, 71 S.W. 263 (1902).

Verdict finding the accused guilty as charged in the indictment and fixing his "penalty" at one year in the penitentiary was not invalid, as the word "punishment" was evidently intended. *Russell v. State*, 97 Ark. 92, 133 S.W. 188 (1910).

The jury may amend its verdict as to form. *Hamer v. State*, 104 Ark. 606, 150 S.W. 142 (1912).

Verdict may be received on Sunday. *Eyer v. State*, 112 Ark. 37, 164 S.W. 756 (1914).

Verdict form which failed to show maximum and minimum punishments was proper inasmuch as there is no requirement that a form of verdict given a jury show the sentencing alternatives and it is the responsibility of the party desiring a particular form of verdict to prepare it and request the court to submit it. *Rowland v. State*, 263 Ark. 77, 562 S.W.2d 590 (1978).

There is no requirement that a verdict form be submitted to the jury by the trial judge, although it is the better practice to do so. *Rowland v. State*, 263 Ark. 77, 562 S.W.2d 590 (1978).

General Verdict.

A general verdict of guilty on an indictment containing several counts is good, if either of the counts are good and are sustained by evidence. *Brown v. State*, 10 Ark. 607 (1850); *Howard v. State*, 34 Ark. 433 (1879); *Watkins v. State*, 37 Ark. 370 (1881); *Cooper v. State*, 37 Ark. 412 (1881).

Where there are two counts substantially the same, a general verdict is a finding upon both counts and is sufficient. *Levells v. State*, 32 Ark. 585 (1877).

Where defendant was convicted under an indictment containing two counts, and a general verdict of guilty, without specifying the offense, was received without objection, he could not subsequently object to the form of the verdict if the evidence

was sufficient to sustain a conviction of either offense. *Cargill v. State*, 76 Ark. 550, 90 S.W. 618 (1905).

A general verdict is a conviction of everything well charged. *Blackshare v. State*, 94 Ark. 548, 128 S.W. 549 (1910).

Reasonable Doubt.

Subsection (g) applies to misdemeanors as well as to felonies. *State v. King*, 20 Ark. 166 (1859).

The rule that the guilt of the accused must be established to the exclusion of every other hypothesis only applies in cases depending upon circumstantial evidence. *Cohen v. State*, 32 Ark. 226 (1877).

Reconsideration.

Evidence sufficient to show there was not such absolute discharge of the jury as prevented the court from recalling it for the purpose of correcting the verdict. *Levells v. State*, 32 Ark. 585 (1877).

The court may refuse a verdict and direct the jury to reconsider, and when they do reconsider and alter the verdict, the second verdict is the verdict of the jury. *McRae v. State*, 49 Ark. 195, 4 S.W. 758 (1887).

Sentence Fixed by Jury.

Under subsection (c) of this section and § 5-4-103, the defendant was entitled to have a jury fix his sentence for his conviction of driving while intoxicated, and his proffered jury instruction to this effect should have been given. *Tharp v. State*, 294 Ark. 615, 745 S.W.2d 612 (1988).

Setting Aside.

The court may set aside a verdict of acquittal of an offense punishable by fine only. *Fenix v. State*, 90 Ark. 589, 120 S.W. 388 (1909).

Cited: *Puckett v. State*, 194 Ark. 449, 108 S.W.2d 468 (1937); *Clayton v. State*, 247 Ark. 643, 447 S.W.2d 319 (1969); *Brewer v. State*, 251 Ark. 7, 470 S.W.2d 581 (1971); *Lowe v. State*, 264 Ark. 205, 570 S.W.2d 253 (1978); *Ashlock v. State*, 64 Ark. App. 253, 983 S.W.2d 448 (1998).

16-89-127. Verdict — Misdemeanor included in felony.

When an offense is charged in an indictment to have been committed with peculiar circumstances as to time, place, person, property, value, motive, or intention, the offense, without the circumstances, or with

part only, is included in the offense, although that charge may be a felony, and the offense, without the circumstances, a misdemeanor only.

History. Crim. Code, § 261; C. & M. Dig., § 3212; Pope's Dig., § 4048; A.S.A. 1947, § 43-2155.

16-89-128. Polling of jury members.

Upon a verdict's being rendered, the jury may be polled at the instance of either party, which consists of the clerk or judge asking each juror if it is his or her verdict. If one (1) answers in the negative, the verdict cannot be received.

History. Crim. Code, § 264; C. & M. Dig., § 3216; Pope's Dig., § 4052; A.S.A. 1947, § 43-2160.

CASE NOTES

ANALYSIS

Construction.
Authority of court.
Scope of inquiry.
Unanimous verdict.

Construction.

This statute is mandatory. *Wingfield v. State*, 95 Ark. 71, 128 S.W. 562 (1910).

Authority of Court.

If there is any reason to doubt that all the jurors concur, it is competent for the court, of its own motion, to cause the jury to be polled. *Harris v. State*, 31 Ark. 196 (1876).

The court is not limited to receiving the answer "yes" or "no," but is limited to ascertaining whether the verdict is the juror's verdict, without examining the juror as to how the verdict was arrived at, except as to whether it was arrived at by lot. *Kindrix v. State*, 138 Ark. 594, 212 S.W. 84 (1919).

Scope of Inquiry.

A jury can be polled pursuant to this section, but the inquiry should be limited to determining that the verdict is that of each juror and "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror"; it would be highly unrealistic to think that jurors do not consider the possibility of parole in arriving at a sentence in a criminal case

and the outward expression of that by a juror was not grounds for a new trial where any information jurors had about possibility of parole was independent knowledge which they had prior to trial. *Ashby v. State*, 271 Ark. 239, 607 S.W.2d 675 (1980).

When a juror casts doubt on whether the verdict rendered is his verdict, and the court questions the juror until the juror casts an unequivocal vote, the juror is voting in the courtroom rather than in the jury room; although there are some cases in which courts have been able successfully to question a juror in open court and remove confusion without being reversed, those are rare circumstances in which, for example, the confusion is caused by the inability of the juror to hear the question, or a juror is reluctant, based on religious scruples, to use the word "guilty". *Rhodes v. State*, 290 Ark. 60, 716 S.W.2d 758 (1986).

Unanimous Verdict.

Where the guilty verdict is not unanimous because of a juror's response to being polled, the jurors must be returned to the jury room for further deliberation; otherwise, the trial judge runs the risk of conducting a proceeding which, albeit well meant, will have the palpable effect of coercion. *Rhodes v. State*, 290 Ark. 60, 716 S.W.2d 758 (1986).

If the question on the juror's mind is the ultimate one of whether the accused is guilty, then that juror is expressing a

reasonable doubt, and the verdict is not unanimous; therefore, where, in a capital murder trial, the jurors were polled as to their guilty verdicts and one juror responded that his verdict was with a ques-

tion, the defendant's conviction was reversed. *Rhodes v. State*, 290 Ark. 60, 716 S.W.2d 758 (1986).

Cited: *Ward v. State*, 20 Ark. App. 172, 726 S.W.2d 289 (1987).

16-89-129. Final adjournment.

A final adjournment of the court discharges a jury.

History. Crim. Code, § 252; C. & M. Dig., § 3196; Pope's Dig., § 4032; A.S.A. 1947, § 43-2161.

16-89-130. New trial.

(a) A new trial is the reexamination of an issue of fact in the same court by another jury after a verdict has been given.

(b) The application for a new trial must be made at the same term at which the verdict is rendered, unless the judgment is postponed to another term, in which case it may be made at any time before judgment.

(c) The court in which a trial is had upon an issue of fact may grant a new trial when a verdict is rendered against the defendant by which his or her substantial rights have been prejudiced, upon his or her motion, in the following cases:

(1) Where the trial in the case of a felony was commenced and completed in his or her absence;

(2) Where the jury has received any evidence out of court other than that resulting from a view as provided in this code;

(3) Where the verdict has been decided by lot, or in any other manner than by a fair expression of opinion by the jurors;

(4) Where the court has misinstructed or refused to properly instruct the jury;

(5) Where the verdict is against law or evidence;

(6) Where the defendant has discovered important evidence in his or her favor since the verdict; and

(7) Where, from the misconduct of the jury or from any other cause, the court is of opinion that the defendant has not received a fair and impartial trial.

(d) The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to in evidence or in argument.

History. Crim. Code, §§ 266-268, 270; C. & M. Dig., §§ 3217-3219, 3221; Pope's Dig., §§ 4057-4059, 4061; A.S.A. 1947, §§ 43-2201 — 43-2203, 43-2205.

Publisher's Notes. This section may be affected by § 16-91-105 and ARCrP

36.22 as to the time for filing a motion for a new trial.

"This code," referred to in this section, means the Code of Practice in Criminal Cases of 1869. See parallel reference tables in the tables volume.

Cross References. Effect of filing motion for new trial upon appeal, ARCrP 36.21.

Time for filing motion for new trial,

motion in arrest of judgment, or any other application for relief, § 16-91-105, ARCrP 36.22.

RESEARCH REFERENCES

ALR. Nature and determination of prejudice caused by remarks or acts of state trial judge criticizing, rebuking, or punishing defense counsel in criminal case as requiring new trial or reversal — Individualized determinations. 104 ALR 5th 357.

DNA evidence as newly discovered evidence which will warrant grant of new trial or other postconviction relief in criminal case.

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CASE NOTES

ANALYSIS

Application.

—In general.

—Timeliness.

Discretion of court.

Effect.

Grounds.

—Instructions.

—Jury misconduct.

—Newly discovered evidence.

—Surprise.

—Verdict by lot.

Pleading.

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Application.

A motion for new trial waives all exceptions not expressly embodied in it. Johnson v. State, 43 Ark. 391 (1884).

Where supplementary motion for new trial supported by affidavits and alleging incompetency of a juror was presented to trial judge in chamber in county other than that of trial, new matter was not properly in the record. Sims v. State, 203 Ark. 976, 159 S.W.2d 753 (1942).

Failure of the trial court to read or have read the motion for new trial which was submitted to the court, and also the supporting affidavits, could not deprive the accused of a new trial if he was entitled to it. Ferguson v. State, 95 Ark. 428, 129 S.W. 813 (1910).

—In General.

In a motion for new trial alleging jury misconduct and lack of a fair trial, ARCrP

36.22 and § 16-91-105 have set the time frame, 30 days from date of judgment, and have effectively superseded this section. Cigainero v. State, 310 Ark. 504, 838 S.W.2d 361 (1992).

—Timeliness.

An application for a new trial for newly discovered evidence cannot be made at a term subsequent to that at which the verdict was rendered and the judgment entered. Thomas v. State, 136 Ark. 290, 206 S.W. 435 (1918).

A motion for a new trial could be made at a term subsequent to that at which the verdict was rendered, where sentence was not pronounced until such subsequent term. Collatt v. State, 165 Ark. 136, 262 S.W. 990 (1924).

Motion held timely. Bodnar v. State, 176 Ark. 1049, 5 S.W.2d 293 (1928); Gross v. State, 242 Ark. 142, 412 S.W.2d 279 (1967); Higginbotham v. State, 251 Ark. 832, 475 S.W.2d 522 (1972).

Motion for new trial should be made and acted upon at the same term at which the judgment was rendered, and where after filing motion for new trial the cause was continued but the judgment was not set aside, the court had no jurisdiction to act on the motion at a subsequent term. Corning v. Thompson, 113 Ark. 237, 168 S.W. 128 (1914); State v. Neil, 189 Ark. 324, 71 S.W.2d 700 (1934).

Where defendant's motion for new trial alleging jury misconduct and lack of a fair trial was filed nearly 90 days after conviction,

tion was entered, it was not timely. *Cigainero v. State*, 310 Ark. 504, 838 S.W.2d 361 (1992).

Where petitioner's claim of juror misconduct was brought over a decade after his conviction, the argument was untimely; the matter could have been brought in a motion for new trial immediately after the verdict and conviction. *Echols v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 32 (Jan. 20, 2005).

Discretion of Court.

In a prosecution for first-degree assault and second-degree battery, the trial court did not abuse its discretion by denying defendant's motion for new trial which was based on defendant's claim that a witness who was subpoenaed by the state but not called to testify would have corroborated defendant's theory of self-defense, where a list of all witnesses to be subpoenaed by the state had been supplied to defense counsel by the prosecuting attorney one year prior to trial and where all the witnesses were present at the trial. *Newberry v. State*, 262 Ark. 334, 557 S.W.2d 864 (1977).

The trial court did not abuse its discretion in denying motion for new trial where the evidence proffered by defendant was either cumulative or an attack on the credibility of the trial witnesses; such evidence is not grounds for a new trial. *Orsini v. State*, 281 Ark. 348, 665 S.W.2d 245, cert. denied, 469 U.S. 847, 105 S. Ct. 162, 83 L. Ed. 2d 98 (1984).

The decision whether to grant a new trial is left to the sound discretion of the trial judge and his decision will not be reversed in the absence of an abuse of discretion or manifest prejudice to the complaining party. *Vasquez v. State*, 287 Ark. 468, 701 S.W.2d 357 (1985).

Effect.

Where a judgment has been rendered, the filing of a motion for a new trial and the continuing of the cause thereafter does not have the effect of setting aside the judgment. *Corning v. Thompson*, 113 Ark. 237, 168 S.W. 128 (1914).

Grounds.

Evidence insufficient to establish grounds for a new trial. *Meadows v. State*, 72 Ark. 155, 78 S.W. 761 (1904); *Reed v. State*, 102 Ark. 525, 145 S.W. 206 (1912); *Hill v. State*, 255 Ark. 720, 502 S.W.2d 649

(1973); *Kirkendall v. State*, 265 Ark. 853, 581 S.W.2d 341 (1979); *Henderson v. State*, 284 Ark. 493, 684 S.W.2d 231 (1985); *Williams v. State*, 17 Ark. App. 173, 705 S.W.2d 896 (1986).

Denial of continuance would have been proper grounds for a motion for new trial had the defendant shown that he was prejudiced thereby. *Finch v. State*, 262 Ark. 313, 556 S.W.2d 434 (1977).

Evidence which only attacks the credibility of other testimony is not grounds for a new trial. *Williams v. State*, 289 Ark. 69, 709 S.W.2d 80 (1986).

—Instructions.

Instruction held not to provide grounds for new trial. *Arnold v. State*, 150 Ark. 27, 233 S.W. 818 (1921).

—Jury Misconduct.

Juror misconduct not grounds for new trial. *Vowell v. State*, 72 Ark. 158, 78 S.W. 762 (1904); *Ary v. State*, 104 Ark. 212, 148 S.W. 1032 (1912); *Zinn v. State*, 135 Ark. 342, 205 S.W. 704 (1918).

Juror misconduct held to require new trial. *Myers v. State*, 111 Ark. 399, 163 S.W. 1177 (1914).

The separation of a juror from his fellow jurors during trial of a felony case casts upon the state the burden of showing that no improper influence was brought to bear upon the juror during his absence; and if the state fails to show that he was not subject to improper influence during such separation, the defendant will be entitled to a new trial. *Ferguson v. State*, 95 Ark. 428, 129 S.W. 813 (1910).

Where letter from foreman suggested some jurors reached the verdict of a life sentence against their will, but there was no indication of misconduct or abuse by the other jurors toward the three jurors who did not initially agree, and the fact that the jurors disagreed initially did not, by itself, make their subsequent compromise decision involuntary, there was no basis under former § 43-2203(c)(3) for a new trial. *Smith v. Lockhart*, 946 F.2d 1392 (8th Cir. 1991) (decision under prior law).

The court did not err in granting a new trial where it was faced with evidence that jurors had discussed the facts in the case, as well as the evidence, prior to deliberations and there was testimony that some jurors prematurely formed a conclusion

about the defendant's guilt and then discussed those conclusions with other jurors. *State v. Cherry*, 341 Ark. 924, 20 S.W.3d 354 (2000).

—Newly Discovered Evidence.

A motion for a new trial upon the ground of newly discovered evidence is properly overruled, although the applicant states that he did not know of this testimony at the time of the trial and could not by reasonable diligence have known it, if he fails to state the acts done which are denominated reasonable diligence and the facts and circumstances under which such newly discovered evidence came to his knowledge. *Ward v. State*, 85 Ark. 179, 107 S.W. 677 (1908).

Motions for new trial on the ground of newly discovered evidence are addressed to the legal discretion of the judge and it is only in the case of apparent abuse of that discretion or of injustice that the appellate court will interfere. *Ward v. State*, 85 Ark. 179, 107 S.W. 677 (1908).

Evidence sufficient to require new trial on basis of newly discovered evidence. *Shropshire v. State*, 86 Ark. 481, 111 S.W. 470 (1908); *State v. Scott*, 289 Ark. 234, 710 S.W.2d 212 (1986).

Newly discovered evidence that goes only to impeach the credibility of a witness is not ground for a new trial. *Smith v. State*, 90 Ark. 435, 119 S.W. 655 (1909); *Dewein v. State*, 114 Ark. 472, 170 S.W. 582 (1914).

A motion for a new trial on account of newly discovered evidence should be corroborated by the affidavits of other persons than the accused and, if it can be done, by those of the newly discovered witnesses themselves. *Rynes v. State*, 99 Ark. 121, 137 S.W. 800 (1911).

In a motion for a new trial for newly discovered evidence, the applicant should state the facts and circumstances under which the evidence came to his knowledge and why he had not discovered it sooner. *Young v. State*, 99 Ark. 407, 138 S.W. 475 (1911).

A new trial on the ground of newly discovered evidence is properly denied where such evidence is cumulative merely or where it is not shown why it was not discovered before the trial. *Ary v. State*, 104 Ark. 212, 148 S.W. 1032 (1912).

Evidence insufficient to require new trial on grounds of newly discovered evi-

dence. *Hawthorne v. State*, 135 Ark. 247, 204 S.W. 841 (1918); *Hill v. State*, 289 Ark. 387, 713 S.W.2d 233 (1986), cert. denied, 479 U.S. 1101, 107 S. Ct. 1331, 94 L. Ed. 2d 182 (1987).

The discovery of important evidence after the verdict which was not discoverable earlier by the exercise of due diligence requires a new trial. *McCullars v. State*, 183 Ark. 376, 35 S.W.2d 1030 (1931).

Defendant who makes the mere statement in his motion for new trial that new evidence in his favor has been discovered subsequent to trial has failed to comply with this section. *Taylor v. State*, 230 Ark. 809, 327 S.W.2d 6 (1959).

Newly discovered evidence is one of the least favored grounds for a new trial. *Vasquez v. State*, 287 Ark. 468, 701 S.W.2d 357 (1985).

Critical to the inquiry into newly discovered evidence are the diligence of the defendant in discovering the testimony and the probable effect of the testimony at the trial; evidence which is merely cumulative or an attack on the credibility of the trial witnesses is not grounds for a new trial. *Vasquez v. State*, 287 Ark. 468, 701 S.W.2d 357 (1985).

—Surprise.

It was not error to refuse the state a new trial in a criminal case on the ground of surprise in that the witness upon whose testimony the indictment was found claimed his constitutional privilege of not incriminating himself, if the state's attorney failed to use due diligence to ascertain before the trial whether the witness would claim his privilege and to make application for time to obtain other witnesses. *State v. Bach Liquor Co.*, 67 Ark. 163, 55 S.W. 854 (1899).

Where a party is surprised by testimony which he knows to be false, he should ask for a suspension of the trial to enable him to meet such evidence, and if he goes to trial, taking the chances of acquittal, he cannot ask for a new trial. *Adams v. State*, 100 Ark. 203, 139 S.W. 1116 (1911).

—Verdict by Lot.

A verdict reached by the jury through a compromise of their views is not a verdict by lot but is a fair expression of their views. *Blaylack v. State*, 236 Ark. 924, 370 S.W.2d 615 (1963).

A verdict by lot is defined as involving

an element of chance. *Ward v. State*, 20 Ark. App. 172, 726 S.W.2d 289 (1987).

A majority vote as to sentencing is not the equivalent of voting by lot, and so a jury's less than unanimous decision on sentence does not constitute voting by lot. *Ward v. State*, 20 Ark. App. 172, 726 S.W.2d 289 (1987).

A verdict reached by the jury through a compromise of their views is not a verdict by lot but is a fair expression of their views. *Davis v. State*, 330 Ark. 501, 956 S.W.2d 163 (1997).

Pleading.

Though defendant's pro se motion was styled as a motion for a new trial, it could not be seriously contended that the motion was anything other than one for ARCP 37 (now ARCP 37.1) relief where the motion referred to ARCP 37 (now ARCP 37.1) as its authority and where all of its allegations concerned the collateral issue of ineffective counsel. *Haynes v. State*, 311 Ark. 651, 846 S.W.2d 179 (1993).

Previous Trial.

Where a defendant is tried and convicted of a criminal offense and a new trial is granted him on his own motion, he may be tried again for the same offense. *Johnson v. State*, 29 Ark. 31 (1874).

When a defendant is acquitted of a misdemeanor punishable by fine only, the circuit court may set aside the verdict, upon motion of the state, and again put the defendant upon trial. *Taylor v. State*, 36 Ark. 84 (1880).

It was no defense to an indictment that the defendant had been convicted under a former indictment for the same offense, when the conviction was afterwards set aside on motion of the defendant and a nolle prosequi entered by the prosecuting attorney, whereupon a new indictment

was returned. *Floyd v. State*, 80 Ark. 94, 96 S.W. 125 (1906).

Trial judge's explanation to the jury concerning previous trial did not violate subsection (d). *Walker v. State*, 241 Ark. 300, 663, 408 S.W.2d 905 (1966), appeal dismissed and cert. denied, 386 U.S. 682, 87 S. Ct. 1325, 18 L. Ed. 2d 403, rehearing denied, 387 U.S. 926, 87 S. Ct. 2027, 18 L. Ed. 2d 987 (1967).

Record.

Affidavits or other evidence adduced in support of a motion for a new trial become a part of the record only by being incorporated in the bill of exceptions. *Quertermous v. State*, 114 Ark. 452, 170 S.W. 225 (1914).

It is in the province of a motion for new trial to bring upon the record all irregularities that occurred at the trial. *Werner v. State*, 44 Ark. 122 (1884); *Chiles v. State*, 45 Ark. 143 (1885); *Sanders v. State*, 55 Ark. 365, 18 S.W. 376 (1892); *Overton v. State*, 57 Ark. 60, 20 S.W. 590 (1892).

Cited: *Howard v. State*, 58 Ark. 229, 24 S.W. 8 (1893); *Youngblood v. State*, 161 Ark. 144, 255 S.W. 572 (1923); *Puterbaugh v. State*, 217 Ark. 686, 232 S.W.2d 984 (1950); *Karoley v. A.R. & T. Elecs., Inc.*, 235 Ark. 609, 363 S.W.2d 120 (1962); *Gross v. State*, 246 Ark. 909, 440 S.W.2d 543 (1969); *Henderson v. Skerczak*, 247 Ark. 446, 446 S.W.2d 243 (1969); *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106 (1977); *Kozal v. State*, 264 Ark. 587, 573 S.W.2d 323 (1978); *Halfacre v. State*, 265 Ark. 378, 578 S.W.2d 237 (1979); *Chisum v. State*, 274 Ark. 332, 625 S.W.2d 448 (1981) (decision under prior law) *Boren v. State*, 297 Ark. 220, 761 S.W.2d 885 (1988); *Chism v. State*, 312 Ark. 559, 853 S.W.2d 255 (1993); *Cigainero v. State*, 321 Ark. 533, 906 S.W.2d 282 (1995).

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